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LEGAL ASPECTS OF EDUCATIONAL FACILITIES

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By

Walter Hetzel, Superintendent
Ames, Iowa Public Schools

Manny Brown, Member
Racine Board of Education

Max Ashwell
Wisconsin Dept. of Public Instruction

Professor Richard Rossmiller
The University of Wisconsin

Professor LeRoy Peterson
The University of Wisconsin

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ERIC Clearinghouse on Educational Facilities
The University of Wisconsin
Madison, Wisconsin

March, 1969

FOREWORD

An invitational conference was held in early July, 1968 at the University of Wisconsin. The theme of the conference was Environment For Learning.

These papers were presented during the conference. The transcription of that presentation is contained herein. It is a statement which will bo of value to educational leaders, design specialists, and students of the subject.

The ERIC Clearinghouse on Educational Facilities (ERIC/CEF) was a sponsor of the conference, as were several educational associations and agencies. ERIC/CEF is a clearinghouse of information about sites, buildings, and equipment used for educational purposes; included are the efficiency and effectiveness of activities such as planning, financing, constructing, renovating, maintaining, operating, utilizing, and evaluating educational facilities.

ERIC/CEF is part of a network of national clearinghouse covering many fields of educational research. Information from all these clearinghouses is reported monthly in RESEARCH IN EDUCATION (RIE), a publication of the U.S. Government Printing Office (annual subscription: Domestic, $21.00, Foreign, $26.25).

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ERIC/CEF invites you to submit documents which are related to the activities described in the first paragraph above.

Howard E. Wakefield,
Director

March, 1969

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C. Annotated Reference Lists

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Note: Pagination - Taken from
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LIABILITY AND SCHOOL FACILITIES

Walter Hetzel, Superintendent of
Schools and Attorney-at-Law
Ames, Iowa

Introduction: Dr. Stewart D. North

In our exploration of the many areas related to Educational Facilities, we are indeed pleased that we were able to bring to this group Mr. Walter Hetzel. It is not very often we have a person who wears the several hats that this gentleman does. He is unique in that he is an attorney-at-law, member of the Iowa bar, and a superintendent of some 13 years in his current position and prior to that at Decorah,Iowa. I think 13 years as a superintendent in a major city in these troubled times indicate his accomplishments and contributions to Ames.

He is one of these rare individuals that we keep hoping for when we talk in terms of individual study. In talking briefly with Mr. Hetzel he indicated that he had not done all his study through the formal channels of a law school but had done much study on an individual basis. Many of us keep hoping that soon we will look at this "magic number of one" which Alan Green referred to yesterday and then talk about educational programs in terms of individual processes rather than group processes. Walter Hetzel is an ideal example of what can be done if you follow this procedure.

He is a past president of National Organization on Legal Programs of Education in which Professor Peterson and Professor Rossmiller are active. He blends together the happy mix of the practitioner's view and the legal view. I do not really see how he wears these two hats. My contact with attorneys has always been such that if I asked them for a decision, they say, "Well, I think it will be this way, but if you really want to find out, let us put it to the test in the courts." In the absence of abundant money to do that I usually just take their best guess. Walter, we are very pleased to have you with us.

Mr. Walter Hetzel:

Thank you Dr. North. One thing that interested me as I watched the group assemble this afternoon is the fact that the ladies decided that this session was no place for them. I do not believe it is quite as bad as that, but I think there is a little change of tempo when you get involved with an attorney.

I am glad to be back on this campus this afternoon and this week. In fact, when I saw the nature of the program, I became determined to participate in the total program and I found it very, very valuable. I attended one summer session on this campus many years ago just after I had received my Bachelor's Degree, a coaching course under Dr. Meanwell. It was a valuable experience all the way along.

It was pointed out that I am an attorney as well as a school superintendent. I assume that that was intended to be a compliment. With deference to the other attorneys who are here I extend my apologies to them. I want to apologize although I do not need to because attorneys are a tough breed! Let me tell you the definition that I heard of an attorney not too long ago which was given by a former dean of the Howard University College of Law. He said an attorney is a fellow that gets two guys stripped down to fight and then he steals their clothes.

You might wonder why a fellow who is engaged in the business of public education, the greatest effort to improve our society that we have had over all the years that we have been a country, why a fellow like that would get involved in a business like law defined as this dean defined it. I think it may be due in part to a story I heard when I was taking school administration courses. It was a story of a lawyer who was traveling through shark-infested waters, and he accidently fell overboard. All those on deck expected him to be immediately gobbled up by the sharks. Much to their surprise the lawyer started to swim with the sharks forming an escort around him. The lawyer was pulled on board the ship unharmed. He was asked by one of those on deck how it happened the sharks did not attack him as they usually do. The lawyer said, "Oh, they wouldn't attack me. This was professional courtesy on their part."

As I go into this topic of liability as it relates to school facilities it should be helpful to those who are unfamiliar with law to explain what is meant by liability. As liability is used here it relates to tort law. A tort is a private wrong, a breech of duty that subjects the person committing the breech to an action for damages. Whether or not the defendent will be held to have committed the tort and therefore be required to pay damages to cover the loss suffered depends upon whether or not he was negligent. So, it is important that we understand how the courts determine negligence.

Prosser defines negligence as "conduct falling below a prescribed standard established for the protection of others against unreasonable risks of harm." The determination of whether one's acts meet this standard is a question of fact for the jury.

There are two general factors involved in negligence; the first is that of a reasonably prudent man, and the second is the foreseeability of the possible injury. If the defendant could not reasonably foresee any injury as result of his act, or if his conduct was reasonable in the light of what he could anticipate, there was no negligence and hence no liability.

There are four essential elements that must be established to prove negligence: 1. That the defendant had a duty or obligation requiring him to conform to a certain standard of conduct for the protection of others against unreasonable risks. 2. That he failed to conform to the standard of conduct required. 3. That there was a reasonably close causal connection between the conduct and the resulting injury. 4. That the actual loss or damage resulted from his failure to conform to the standard of conduct.

Because these four elements are so essential I'll go over them again.

In most states if the plaintiff also was negligent or failed to meet this standard of care of the ordinarily prudent man under the same or similar circumstances, he can collect nothing from the defendant whose negligence helped cause the injury. The law presumes the injured party was the author of his own injury and therefore not entitled to any restitution from another party who also may have contributed to his injury. However, this general rule of nonliability on the part of the defendant, if the plaintiff also is contributorily negligent, is not followed in Wisconsin. Wisconsin follows the doctrine of "comparative negligence." If, for example, 55 per cent of the total injuries suffered is due to the negligence of the defendant and 45 per cent to the negligence of the plaintiff, the defendant pays 55 percent of the loss suffered and the plaintiff must absorb 45 per cent.

The determination of whether there is negligence, contributory negligence and the degree of comparative negligence involved are questions of fact to be decided by the jury pursuant to instructions from the judge who will set forth what is to be proved.

It is often said that if a person's conduct measures up to or conforms to the standard of conduct that the reasonable and prudent man would exercise under the same or similar circumstances there is no negligence. Of course the reasonable and prudent man is hypothetical only and not really a person. He is real only to the extent that courts and juries conjure him up from time to time to decide what such a person would or would not do in a situation like the one confronted by the party charged with negligence. If the "reasonable man" could not have foreseen that harm or injury would result from what the party did or failed to do, it is unlikely the jury or court would find negligence. The writer, A. P. Herbert, in his book, Misleading Cases in the Common Law, wrote with humor and much truth about the nonexistent "reasonable man." He stated,

> "The Common Law of England has been laboriously built about a mythical figure--the figure of the 'Reasonable Man.' ***He is an ideal, a standard, the embodiment

> of all those qualities which we demand of the good citizen. ***The Reasonable Man is always thinking of others; prudence is his guide and 'Safety First' ***his rule of life. ***He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or bound; who neither stargazes nor is lost in meditation when approaching trap doors or the margin of a dock; ***who never mounts a moving omnibus and does not alight from any car while the train is in motion; ***and will inform him of the history and habits of a dog before administering a caress; ***who never drives his ball till those in front of him have definitely vacated the putting green; ***who never from one year's end to another makes excessive demand upon his wife, his neighbors, his servants, his ox, or his ass; ***who never swears, gambles, or loses his temper; ***who uses nothing except in moderation and even while he flogs his child is meditating only on the golden mean. Devoid in short of any human weakness, with not one single saving vice, ***as careful for his own safety as he is for that of others, this excellent character ***is fed and kept alive ***by the common jury. He has gained in power with every case in which he has figured."

These opening remarks explain the basic legal principles involved in liability as it relates to tort law.

SCHOOL DISTRICT LIABILITY

I'll turn now to a consideration of who is liable for torts that occur in and around the school. In doing this I'll take up first the liability of the school district and later on cover school officers and employees.

The general rule in most states in the United States is that the school district is immune to tort liability. While this rule appears not to apply in Wisconsin it will be helpful to consider the broad picture before going specifically to Wisconsin.

In a few states the courts have changed the rule by abrogating the immunity of the school district through court action and in a few other states the immunity has been eliminated by statute.

A number of states get around the general rule of nonliability of school districts to permit recovery in certain circumstances. The three major exceptions to the rule of nonliability are; maintenance of a nuisance, safe place statutes such as you have here in Wisconsin, and proprietary functions. I'll not take the time to go into the nuisance and proprietary function exceptions but will cover the safe place statutes in some detail.

Before going to the Safe Place Statutes we should take a quick look at the history and reasoning back of the rule of non-liability of governmental agencies. A quotation from a 1962 Minnesota Case overruling the court imposed doctrine of "governmental immunity" with respect to court claims against school districts and other governmental units except the state itself gives a quick comprehensive look. I'll quote from that 1962 Minnesota Case:

> "All of the paths leading to the origin of governmental tort immunity converge on Russell v. The Men of Devon, (1788). This product of the English Common Law was left on our doorstep to become the putative ancestor of a long line of American cases beginning with Mower v. Leicester, 9 Mass. 247 (1812). Russell, in The Men of Devon, sued all of the male inhabitants of the County of Devon for damages occurring to his wagon by reason of a bridge being out of repair. It was apparently undisputed that the county had a duty to maintain such structures. The court held that the action would not lie because: (1) to permit it would lead to 'an infinity of actions,' (2) there was no precedent for attempting such a suit, (3)only the legislature should impose liability of this kinds, (4) even if defendants are to be considered a corporation or quasi-corporation there is no fund out of which to satisfy the claim, (5) neither law nor reason supports the action, (6) there is a strong presumption that what has never been done can not be done, and (7) although there is a legal principle which permits a remedy for every injury resulting from the neglect of another, a more applicable principle is 'that it is better that an individual should sustain an injury than that the public should suffer an inconvenience.' The court concluded that the suit should not be permitted 'because the action must be brought against the public.' There is no mention of the 'King can do no wrong,' but on the contrary it is suggested that plaintiff sue the county itself rather than its individual inhabitants. Every reason assigned by the court is born of expediency. The wrong to plaintiff is submerged in the convenience of the public. No moral, ethical, or rational reason for the decision is advanced by the court except the practical problem of assessing damages against individual defendants. The court's invitation to the legislature has a familiar ring. It was finally accepted as to claims against the Crown in 1947, although Russell had long since been overruled."

This principle of jurisprudence in the United States has been severely critized in recent years by numerous authorities. The Illinois Supreme Court in a 1959 decision in a school bus-pupil injury action quoted with approval some of the strong language being used to express disapproval of the immunity doctrine.

And I quote from that case:

> "The whole doctrine of governmental immunity from liability for tort rests upon a rotten foundation. It is almost incredible that in this modern age of comparative sociological enlightenment, and in a republic, the medieval absolutism supposed to be implicit in the maxim 'the King can do no wrong' should exempt the various branches of the government from liability for their torts, and that the entire burden of damage resulting from the wrongful acts of government should be imposed upon the single individual who suffers the injury, rather than be distributed among the entire community constituting the government, where it could be borne without hardship and where it justly belongs....In preserving the sovereign immunity theory, courts have overlooked that the Revolutionary War was fought to abolish that 'divine right of kings' on which the theory is based."

The court felt that today, when public education is one of the biggest businesses of the country, immunity can not be justified on the theory of protection of public funds and public property. On analysis, the court said, "Immunity is based on the idea that payment of damage claims is a diversion of education funds to an improper use." The court stated that:

> "The payment of damage claims incurred as an adjunct to transportation is as much a 'transportation purpose' and therefore a proper authorized purpose as are payments of other expenses involved in operating school buses. If tax funds can properly be spent to pay premiums on liability insurance there seems to be no good reason why they can not be spent to pay the liability itself in the absence of insurance."

In 1962, three years after this Illinois Bus Case, your own Supreme Court got on the moving band wagon and eliminated governmental tort immunity in the frequently quoted case known as Holytz v. City of Milwaukee. This case causes Wisconsin to be one of the states that has abrogated immunity by court action.

In this Milwaukee Case, the city operated a playground for small children. A drinking fountain had been constructed on top of a concrete slab. On the slab was a heavy steel trap door that was used to cover a water meter pit. An employee of the city negligently left the trap door open. This heavy door fell on the hands of a child, severely injuring her. The child's father sued the city to recover damages for the child's injury.

The Immunity Doctrine had been in effect in Wisconsin since the case of Hayes v. City of Oshkosh in 1873. The attorneys for the child therefore sought to recover under two exceptions to the immunity rule; (a) that the city was carrying on a proprietary rather than a governmental function, and (b) that the door constituted a nuisance. The lower court held that no cause of action was asserted and based its decision on the Immunity Doctrine firmly established by the Supreme Court of Wisconsin in a long line of decisions.

The Wisconsin Supreme Court reversed the decision of the lower court and held for the child. In doing so it waived aside technicalities. It held that the legal principle of starry decisions was less important than justice to the child. It said and I quote:

> "We are now prepared to disavow those rulings of this court which have created and preserved the Doctrine of Governmental Immunity from tort claims."

The court further stated and I quote:

> "We consider that abrogation applies to all public bodies within the state: The state, counties, cities, villages, towns, school districts, sewer districts, drainage districts, and any other political subdivision of the state--whether they be incorporated or not. By reason of the rule of respondent superior a public body shall be liable for damages for torts of its officers, agents, and employees occurring in the course of business of such public body."

The court went on to point out, however, that so far as the state is concerned a careful distinction must be made between the abrogation of the immunity doctrine and the right of a private party to sue the state. Henceforth, the court said, "There will be substantive liability on the part of the state but the right to sue the state remains subject to the Wisconsin Constitution which provides: 'The Legislature shall direct by law in what manner and in what court suits may be brought against the state.'" As far as action against the state is concerned, the court said the case removed the state defense of nonliability for torts but it has no effect upon the state's sovereign right under the constitution to be sued only upon its consent.

Turning now to statutes that impose liability on school districts for tort the "Safe Place Statutes" and the "Save Harmless Statutes" seem to be the most important. Your Wisconsin "Safe Place Statute" is widely quoted and as you know much litigation has revolved around it here in Wisconsin. While most of you have undoubtedly read it, because of its importance I'll quote it again:

> "101.06 Employer's duty to furnish safe employment and place.
> Every employer shall furnish a place of employment which shall be safe for employees therein and for frequenters

> thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, and every architect shall so prepare the plans for the construction of such place of employment or public building, as to render the same safe."

A count of the number of citations under this statute in Wisconsin's Statutes Annotated totals 775. There are, of course, a great many duplications in this count. It also should be pointed out that relatively few of these citations are from public education cases. The statute as originally enacted in 1911 did not apply to school districts. Later revisions did bring public school districts under the Safe Place Statute. You will note it now states: "Every owner of a....public building now or hereafter constructed shall....render the same safe." Other statutes also helped cause school districts to be subject to this statute. Consequently, the body of law developed under the act in cases not involving school districts directly would now seem to be applicable to them.

The following are some of the more important holdings of the court under the Safe Place Statute.

No distinction is made between an employee and a frequenter. Both are entitled to equal protection under the statute.

A highway in a municipality was not a "Place of Employment" within the Safe Place Statute and hence a municipality was not liable for injuries sustained by an infant when his sled was struck by a truck which could not stop because of icy conditions.

An employer is not liable to frequenters unless the employer has actual or constructive notice of conditions that render the place of employment unsafe. This presumes the employer carries on a reasonably adequate inspection program.

There is a rule that the master or employer is not obliged to inspect a simple tool for safety. This rests upon the assumption that the servant or employee is in as good, if not a better, position to observe any defect than is the master or employer. A 1914 case held that a stepladder furnished by the employer for the employee to stand upon while working is a place to work and not a tool with which to work and the rule that the employer need not inspect a simple tool does not apply in an action for injuries caused by defect in the stepladder.

In an 1894 case, an employee was sent on the roof of a building to make repairs. The roof which was made of sheet iron had corroded due to ashes and dirt from the defendant's furnace which had negligently been allowed to accumulate on the roof. The employee was ignorant of the roof's condition. It broke under him and he was injured. He recovered damages.

An employer who did not protect the rope of a hanging scaffold from splashing acids used by employees cleaning brick failed to furnish a "Safe Place of Employment." An employee's death from fall when the rope broke was compensable.

The Safe Place Statute affords protection to employees and frequenters. However, in 1923, in Sullivan v. School District City of Tomah, it was held that school children are neither employees nor frequenters. Three subsequent Wisconsin cases affirmed this holding. However, in 1964 in Anderson v. Joint School District, the court allowed a student to recover under the Safe Place Statute where she was injured by a defect in the building at a time when she was on the premises after school hours and while attending a dance. In May 1966, in Milynarski v. St. Ritas, the court classed students as frequenters entitled to the protection of the Safe Place Statute. The court said and I quote:

> "If parents and others who are temporarily on the premises under circumstances which do not make them trespassers are frequenters entitled to the protection afforded by the Safe Place Statute, it defies logic and common sense why students attending classes in that building should not be entitled to the same protection."

In this case, a ten year old girl was injured when she fell from a four-foot high railing upon which she was walking and collided with a window in the school building which was about four feet away. Suit was brought against St. Ritas congregation and the architect. The court said the injured girl in this case was not a frequenter because of the definition of a frequenter under Section 101.015 of the Wisconsin statute which defines the term in this way:

> "To mean and include every person, other than an employee, who may go in or be in a place of employment or public building under circumstances which render him other than a trespasser."

The point was the girl was neither in the building nor in the process of entering the building.

An order of the State Industrial Commission providing that stairways and steps of more than three risers shall have at least one handrail constitutes a safety order and the violation of that safety order by an owner of a public building may subject the owner to liability under the Safe Place Statute.

Before a penalty can be imposed for failure to furnish and use safety devices and safeguards, the employer must be reasonably advised or informed as to what safety devices or safeguards are required in order that the question as to whether he is complying may be at least reasonably clear.

A vocational school maintained by a city to enable persons attending it to increase their ability and efficiency as workmen in places where they might thereafter be employed was not a place of employment and a student suing the city for injuries to his hand and arm which were caught in a wood planing machine was not an employee within the Safe Place Statute. This was notwithstanding that incident to carrying on the work of the vocational school some material upon which the students worked was saleable and sold. This was in Kirchof v. City of Janesville in 1949. It would seem however, after Milynarski v. St. Ritas, this student might be considered a "frequenter" and be entitled to recover.

An employee of an independent contractor doing work upon the premises of another is a frequenter requiring the employer to furnish a safe place of employment.

A voluntary frequenter is entitled to benefit of Safe Place Statute to the same extent as an employee.

There have been a few cases in which the injured party has been found to be a trespasser and therefore not entitled to the protection of the statute. In one case, a customer in a store voluntarily walked past a door marked "Employees Only" into an area where she stepped to her left and fell downstairs. She was not permitted to recover from the store owner.

The Safe Place Statute does not require the employer to protect against willful, unlawful, or negligent acts of others.

The statute requires every owner of a public building to construct, repair, or maintain the building so as to render it safe. Safe is defined as, "Such freedom from danger to life, health, safety, or welfare of frequenters and employees as the nature of the building will reasonably permit." This imposes on the building owner a higher duty than that which existed under common law but it does not make such owner an insurer of the safety of frequenters and employees. The mere fact that an accident happens does not prove that the place where the accident happened was not safe.

The duties and obligations the statute imposes on the employers or owners of public buildings does not eliminate the defense of contributory negligence. Employees and frequenters of a public building are under an obligation to exercise ordinary care for their own safety.

In general, a public building is defined to include the building itself and not the grounds, sidewalks, and area around the building. In an interesting case, Lawyer v. Joint District Number 1 decided in 1939, a student was injured when a faulty flag pole fell on him. It was held that the flag pole was not a public building within the Safe Place Statute nor were the school grounds or sidewalk area around the pole. The injured party was not allowed recovery. It should be noted that the action was brought under the Safe Place Statute at a time when school districts were immune to tort liability. It would seem that now, since the Holytz v. Milwaukee Case, such an injured party might be able to recover under Common Law Negligence.

Also, in another very recent Wisconsin case decided in February of this year, a postman was injured when a sidewalk square gave way at an excavation site and he was awarded $15,000 for pain and suffering plus $2,005.38 lost wages and $1,538 for medical expense. There was no barricade as required by Section 62.15 of the Wisconsin Code. A Milwaukee ordinance had also been violated. The failure to barricade was held to constitute negligence per se.

It has been said the duty of the employer or owner of a public building is absolute but the terms "safe" and "safety" are relative not absolute. What is a safe place depends upon the facts and conditions of each case.

A person injured by a glass block falling from a public building as he walks by the building may be able to collect under Common Law Negligence but would not be able to collect under the Safe Place Statute.

The owner of a public building was not required to defer mopping hallways until after the close of business hours in order to avoid liability for injuries to frequenters injured by slipping on the wet floor.

Failure to properly light a public building may subject the owner to liability under the Safe Place Statute.

The failure of church authorities to light a hallway near stairs which caused an injury to a plaintiff attending a church luncheon was a question for the jury. Also, a building owner's failure to turn on the lights when the premises were dark and in use might constitute a failure to maintain the premises in a safe condition.

It is proper for the judge to admit as evidence the common practice in a community or the custom in a trade to help determine what meets the required standard for reasonable safety. The jury can then take this into consideration in arriving at its verdict. In one case evidence that more than 2,000 doors like the one causing injury to the plaintiff had been installed in and around the city eight years prior to the plaintiff's accidental injury was a usage properly considered in determining whether the Safe Place Statute was violated.

Comparative negligence shows up in some of the cases. In an action for injuries sustained by a hotel guest when he fell down a stairway in which the jury found the absence of a handrail down the center of the stairway to be evidence of negligence, the jury also found the guest to be guilty of contributory negligence for failing to observe the position of his feet immediately prior to his fall and that his negligence constituted 20 per cent of the cause of the injury.

This concludes my comments concerning school district liability and I'll now go to liability of school board members.

LIABILITY OF SCHOOL BOARD MEMBERS

School board members are frequently concerned about their liability in connection with school related injuries. I suppose this is not altogether bad, because a concern of this nature may cause board members to be vigilant in promoting safe conditions. However, they should not lose weight nor sleep because of this concern. There are almost no cases in which school board members have been held liable. Harry Rosenfield in his excellent book Liability for School Accidents summed it up very well with this statement and I quote:

> "In the absence of evidence of bad faith or improper motives school district trustees and officers cannot be held personally liable for the negligent performance of the duties imposed upon them in their corporate capacity as a board member, nor can they be held personally liable for negligence of employees of the district. Some states even put this exemption of board members from liability into statutory form."

So long as the board members are engaged in the performance of their official duties involving the exercise of judgment and discretion they may not be held personally liable. However, liability is possible when the action is purely ministerial and involves no exercise of discretion. The courts have held that the school officers are personally liable when they act outside of and beyond the scope of their duties and when they act corruptly, maliciously, willfully, and wrongfully and their actions result in injury. Such cases are very remote. I know of none in Wisconsin. People who behave like that are very, very infrequently chosen as school board members.

LIABILITY OF SCHOOL EMPLOYEES

School superintendents used to be considered employees and not officers by the courts. When they are considered to be officers, they are afforded the same protective position enjoyed by board members. Recent court decisions have tended to classify superintendents in the category of officers. This was true in two Pennsylvania cases; one in 1930 and another in 1937. A 1951 Louisana Case also classified the superintendent as an officer. The Wisconsin Superintendent of Public Instruction was held to be a public officer in February of this year in a reorganization case.

Principals, teachers, and other school employees are classified as employees. If they are negligent in their school work and their negligence results in injury to some one who is not contributory negligent, they are liable for damages. The principles of negligence and liability discussed in the early part of this talk explained the circumstances under which they can be held legally accountable for accidents.

The relatively new ruling of the Wisconsin Supreme Court in 1962 that school districts shall be liable for damages for the torts of their officers, agents, and employees occurring in the course of the business of the school district does not relieve employees of their liability. Both the school district and the negligent employee can be held liable.

There are some states, Iowa being a very recent one, that have Save Harmless Laws. Those laws read something like this which is taken from the Iowa Save Harmless Law passed last year:

> "The governing body shall defend any of its officers and employees, whether elected or appointed and, except in cases of malfeasance in office or willful or wanton neglect of duty, shall save harmless and indemnify such officers and employees against any tort claims or demands, whether groundless or otherwise, arising out of an alleged act or admission occurring in the performance of a duty."

This Iowa statute also makes an interesting and important defense available to the governing body by stating:

> "An affirmative showing that the injured party had actual knowledge of the existence of the alleged obstruction, disrepair, defect, accumulation, or nuisance at the time of the occurrence of the injury, and a further showing that an alternate safe route was available and known to the injured party, shall constitute a defense to the action."

It seems to me that in a great many situations, probably many more than a majority of the situations, the injured party would have had actual knowledge of the existence of the condition causing the injury and he would also have known of another and safe route. This should be true of towns people who frequently use the steps, bleachers, etc. of a school building.

STEPS TO TAKE TO ELIMINATE OR REDUCE LIABILITY

I have now covered what seemed to me to be the most important legal points connected with liability. A brief statement of some steps we as school board members and superintendents could take to eliminate or reduce liability might be in order as I conclude.

1. The planning, design, and,construction of school buildings, facilities, and surrounding grounds should be done with safety factors in mind and according to the standards of recognized authority. This includes, of course, state and municipal fire and safety standards. The standards, regulations, and orders of the Wisconsin Industrial Commission must be met.
2. There should be regular, systematic, and careful inspection of school buildings, play areas, and school grounds to uncover hazards. There should be prompt repair and correction of dangerous, defective, amd deteriorating conditions. While playground equipment does not come under the Safe Place Statute, it should be kept inspected and repaired as liability can and frequently does arise because of worn or defective playground equipment.
3. Poor housekeeping practices that present a threat to safety should be eliminated.
4. If an authorized governmental inspector, fire inspector, or any other type of inspector directs that some repair or corrective action be taken, see to it that it is properly and promptly done.

While these are some of the things we should do, I do not feel we should be unduly concerned about our tort liabilities. We have always tried to cause conditions to be safe for employees, students, and others who might be on the school premises be they called employees, frequenters, or visitors. The relatively few cases that have been brought against school districts, school officials, or school employees is, I believe, an indication we have done these things fairly well. School district liability insurance rates have been relatively low which indicates the risk is not great.

It is wise, however, to carry adequate liability insurance. The most recent case I know of where a school district carried too little insurance was in New Jersey, a "save harmless" state like Iowa. The district carried $200,000. A pupil was injured in a physical education class. The district and teacher were sued. The jury brought in a verdict for $335,140. The insurance carrier paid the $200,000 and the district had to pay $135,140 to save harmless the teacher. The district has brought suit against the insurance company on the ground the tort action could and should have been settled within the $200,000. The suit is now pending in Federal District Court.

Seminar Section 1:..LEGAL ASPECTS OF CONSTRUCTION

Manny Brown, Board Member, Racine Public
Schools and Attorney-at-Law

You would never know but I am a democratic assemblyman, now the minority party in the assembly. Being an attorney-at-Law practicing in Racine I have quite an interest in school law and have done quite a bit of research on the subject. I can answer most legal questions that come up which is one problem of being an attorney on the school board. We have a counsel that we hire, but we do not call for advice during the meeting. The board members turn in their seats and say, "Well what do you say about this?" My reply as a board member is, "Get the stature book out, and I will read the law to you."

During the last term we had two attorneys as school board members. The other day the meeting finished a little ahead of schedule. One of the members attributed this to the fact we have only one attorney left on the board.

I would like to comment on the remarks that Dr. Hetzel made. He did a very fine job on a very difficult subject. The subject of liability is always with us as we know. I find public interest in education is at a high level, because what is done in education affects society in every conceivable way.

There is always the money problem. More money! The big problem is getting it and spending it wisely. In Racine we have the same problem everyone has except of course we are a metropolitan system. Thus, we have problems that perhaps other systems do not have. Year to year different problems affect us in different ways.

Right now, the problem is integration. This is the big thing now. I remember years ago that the big problem was construction. When you talk about Legal Aspects of School Construction you talk about building problems.

It has been said that bricks and mortar do not make a quality school system, but I would say from my experience that modern up-to-date facilities can allow a system to do many things in education better, and also permit progress. This is because new construction will attract better teachers and new blood to the community.

In Racine we have a problem right now in that we are 30 teachers short for next fall. It is the first time that this has happened. We are generally able to attract good teachers, because we have a good competitive salary scale. We are starting at $6500, and yet we are having a hard time getting teachers to teach in our so-called innercore schools. This is a problem which is hitting us the first time.

It is well established by the courts that the source of all powers of the boards of education is in the state constitution and legislative action which originally created the boards. Powers granted directly by states to school district take precedence over local ordinances and municipalities whose powers are based upon grants of powers from the state. This is a basic fact that we know. Therefore, the powers of school boards in this light are those expressly delegated as necessary to the accomplishment of the declared objectives of the school district. This gives the board the power to build. Examples of this power are authority of these boards to acquire sites, buy buildings, contract for construction, and maintain repair of facilities. School boards are limited in such activity to only the powers delegated to these boards. They have no inherent power as such--only statutory powers.

Within this power is the authority of discretion which courts will generally not disturb unless it can be proven that this discretion was abused by a showing of manifest fraud or oppressive injustice. Any attorney will tell you that fraud is very difficult to prove. I can go on and say manifest fraud and mean just what it says, but try to prove it sometimes! You have to prove it by showing intent, and showing the act, and it is a pretty tough proposition.

In the operation of a board with standing committees , the school construction program rests with the Property or Grounds Committee which is first given the task of selection of sites upon which the contemplated facilities will be created. I have been a member of the committee of the Racine Board for a number of years as we operate under a standing committee organization. The committee brings in a report, and then the board takes up the committee report. Some boards operate under a committee-of-the-whole where everyone is involved from the start.

Under Wisconsin law the funds to finance such construction may be acquired by several means depending upon the kind of district under discussion. For instance, a City School District may float a bond issue for construction after first receiving approval from the majority vote of the city council. We used to have that system in Racine before it became a Unified District. A district may plan for such construction by means of a sinking fund built up by means of their annual operating budget necessarily approved by a majority vote of the same council. We had a sinking fund at one time until the council took it away from us. Their position was that if you need money you can bond for it.

Unified and county school districts, on the other hand, must petition for a referendum election within their district for authority to float a bond issue for building needs. We have had two referendum elections in Racine and are planning a third, perhaps for this fall as we need $13 million dollars for construction.'

An alternate method allowed by law is the use of promissory notes for funding. However, the latter method is subject to a petition by one hundred electors for referendum in the district. Unified boards can borrow by promissory notes, but watch out for public disapproval of this particular mode.

Under the law the only time a unified district can float a bond without a referendum or the threat of a referendum is at the time of the district's initial organization where a bond may be floated to pay off existing bonded indebtedness to take title to an existing city school plant.

Courts will generally not intervene or interfere with the exercise of the school board discretion in the selection or location of sites. Currently, however, with the integration question getting a foothold in courts with Supreme Court decisions as a buttress it appears that a site which might lead to a segregated school facility may give rise to a tax-payers' petition for an injunction to restrain the biilding program. We have one of those problems in Racine right now. We have an old school in the inner core and there is a lot of pressure to take down that school and build a new school. That school is 80% negro. If we construct a new facility on that site, we will be accused of constructing a segregated school. In that situation we are damned if we do, and damned if we don't. I say go ahead and build a new school, and then see what happens. We are at least providing a new facility. Actually, I would think a plan for usage of a facility which would tend to result in integrated conditions would probably satisfy the Federal norm which accompanies the use of Federal funds. You can do this in various ways. In fact we have ideas in Racine of "pairing up" schools, perhaps, exchanging a few days a week in certain classes from these schools with other schools. For instance, we would pair a school in the inner-core with a school way out in a so-called one hundred percent white neighborhood, and that might be the answer. Another way to do it is free transfer which, of course, in elementary schools does not work. In junior high school situations we bus.

The way to accomplish integration is probably through pairing, through adjustment of boundaries, perhaps doing away with one facility, and in combining facilities in a middle school. You might have to change your entire elementary structure into running a primary school (maybe K-3 or 4), then run a middle school, and then you could adjust a boundary situation a lot better by having a middle school. Perhaps, you would get an integrated situation without having to bus too many in from an outer area. This will probably satisfy the Federal standards.

When you talk about school construction contracts, that is quite a field in itself. The statutes give express authority to school boards. Many times persons enter into a contract with school boards which is later declared to be void, because the board has not acted in accordance with their authority. The basic premise in the contract is that those who contract with a school district are charged with notice as to the district's limited powers and, therefore, responsible for verifying the contractual powers of the district board. By the same token a board may contract to lease school buildings which have been constructed by a School Building Authority or by any other public corporations authorized to build schools.

It is interesting to note that general municipal laws which apply to contracts entered into by municipal governments such as the city are not applicable to a school district. This is because the courts have reasoned that education is a function of the state and not local government. That is why many times the law which applies to municipal government does not apply to a school district. I find that because we are a unified district, an independent municipality, yet we are governed by different laws than those that govern municipalities such as a city.

School boards acting on school construction matters can only take action at regular or legally called special meetings. Any changes or amendments to an original contract must be approved by the board in a regularly called meeting. We have change orders that come in from time to time, and we have to act on those change orders at a regular meeting in order that they be legal. Generally speaking, it is agreed that the purposes served by bidding on a school construction project are the safeguarding of public funds through the prevention of favoritism, collusion, and extravagance.

Can the board award a building contract without competitive bidding? Generally this is allowed under statutes where an emergency exists or the work is of a repair nature being done by the district's own labor. We do this all the time. There is no law which says you have to bid for a school building project, but generally this is done because of public acceptance. The public wants it, and the public expects it. Wisconsin statute 66.29 does not require that contracts be let by public bids.

In a Supreme Court case, Consolidated School District versus Fry, 11 Wisconsin (2nd) 434 (1960), the Wisconsin Supreme Court held that no statute required the school district to advertize bids for construction. Therefore, the Court held that normal rules of contract law generally prevailed in that an invited proposal may be either accepted or rejected, and no enforceable contract exists before acceptance of the proposal.

Another Supreme Court case Impemberink vrs. Knapp, 14 Wisconsin (2nd) 527, the Court held that where no statute required competitive bidding even though bids were invited, a municipality could accept or reject any of the bids whether regular or irregular, and that rules of contract would prevail. The courts in this state have upheld statute 62.15, paragraph 1, which states that, "All public works the estimated costs of which shall exceed five hundred dollars shall be let by contract to the lowest responsible bidder."

That was enacted for the protection of the taxpayer and not the contractor. Remember, any such contractor has no cause of action against a municipality under claim of being a lowest responsible bidder should that contractor fail to win an award. Who knows that better than I do, because I represented a contractor once against the City of Racine. It want to the Supreme Court and lost. I really researched that subject. I had a pretty good case but this precedent is very, very strong. It does not mean that just because he has the low bid that he has the contract.

The governing body of the city as the case may be has discretionary power to determine whether or not the bid was in accordance with the specifications. Therein lies the test of this power of discretion which by law rests with the governing body. They can always use that as their loophole saying, "You did not bid according to the specifications." Lots of times the specifications mean only what the governing body wants them to mean and they have the discretion to place the interpretation upon what engineers say the specifications mean.

Usually one of the biggest loopholes in interpreting specs is "or equal." What they mean by equal is only what they themselves thought they meant when they wrote it. It has myriad meanings. It is an intangible, actually, but generally I say it means the discretionary power of that body which wrote the specs.

The board's decision, however, must be made honestly, in good faith, and not in an arbitrary or capricious manner. That is what it says in the law. Naturally, a lot of times the decision is made in an arbitrary manner, because they just made up their minds on the specific point. Lots of times it is very hard to undo that mind if you do not have enough power or enough authority to back you up.

If a contractor fails to complete the contract, we now look to the surety. Companies that issue bonds within the realm of construction must conform to a law of the state. I know in my work on the school board that insurance companies take over a contract where a contractor went through bankruptcy. It happened when we were building a junior high school a number of years ago. The bonding company came in and finished the contract. These things happen. That is why, of course, your contractors have to furnish sufficient surety bonds if they are to get a contract award.

There are two purposes for such surety bonds. First is indemnification of the school district for loss that it may suffer as a result of the contractor's failure to complete a contract and secondly the protection of laborers and material, men who put their labor and material in public buildings but have no lien rights by law. The school board must observe and scrupulously follow statutory procedure in filing claims in case there is default by a contractor and a surety must be used to finish.

Many times there is a legal question posed concerning what acts amount to the acceptance of a construction job by the board. The question of liability often turns up as to when such acceptance has taken place and whether or not a claim was filed within the statutory time limit after acceptance which normally does not take place until the work meets the requirements of the applicable laws, specifications, contracts and surety bonds. Many times, of course, money is withheld until the job is fairly well finished. There is always a hold-back percentage, because there are problems that arise after a school opens, after a school has been completed. The basic authority, I would say, which is indigenous to law governing school construction, appears to continue the power of the taxpaying public rather than the right of any individual contractor.

The people have to be satisfied. I know being a board member is a tough job because I have been on the school board 15 years. I think this past year has probably been the toughest one of all the years of my experience. I have never seen so many idiotic letters in the Letters-to-the-Editor column of the local newspaper. I have never had as many strange phone calls. I do not know what it is. It seems to be an age of discontent. The people of Racine should not be discontented, because they are getting good education for their tax dollars, but property taxes are high, probably higher than they have ever been.

Maybe it is because of the international situation. Maybe people are just generally discontented and are taking out their discontent on local officials. I have said this many times in the State Assembly. I hate to see the state cut down on state school aids, because that shifts the blame to local officials, and then I have got to take it in the neck as a school board member. It is just public discontent.

Does anybody have any questions they would like to ask concerning this subject matter?

Question:

Concerning the acceptance of the building: we have been advised two different ways. Supposing the building is to be completed by the beginning of school in the fall, and you are anticipating use of this building, but conditions beyond the control of the contractor have delayed construction. You move into portions of the building without formal acceptance. Are you thereby binding the board and freeing the contractor from liability?

Mr. Brown:

If you move into the building, you should have an agreement with the contractor in that regard to hold him to any defects you may find. I would say that if you make an agreement with him that moving into the building does not *per se* constitute acceptance, you can still hold your cause of action open against him. Do not move into the building though,and constitute that as an acceptance,unless you have cleared with him first.

Question:

Acceptance does not have to be in entirety. Can it be a partial acceptance? Would that still require that the contractor be aware of this because his liability insurer might have to assume some of the responsibility here that was not anticipated?

Mr. Brown:

That is correct. His insurer might claim they are prejudiced so the insurer will have to enter into it. The contracter will have to look to his insurer to find out if he is covered. You also want to make sure that moving in does not constitute a waiver of your right of coming back at the contractor after a while. Of course, you can always come back after him and find fraud or a blatant disregard for the contract. There you have a cause of action for damages against him at any time.

Comment:

Regardless of this,most contractors will give a warranty period within limits.

Comment:

I think in the past we have always written in our specifications that if the building is not done by this date, the owner can move in and will not accept the building until the building is complete, because this is not the regular completion date. This is all spelled out in the specifications so this is all done before moving in.

Question:

What happens when you as a school board negotiate the contract with the contractor to do some work without taking any bids? The taxpayers in the district may bring suit because you have not secured the lowest price offered. Perhaps a contractor who will say that he will do the job for X number of dollars less might be found.

Mr. Brown:

You would not have a case unless such contractor would have made his notice and would have actually been in communication with the board asking for the job at the original bidding. You could not go ahead and dig up somebody and say that they would do it, because the board would not have the offer before it at the time of bid opening to do it at a lower price.

The meetings are always open to the public and the records are always open to the public so if the contractor is on the job, he can check the records of the meetings. Board meetings have to be public by law except when personnel matters or land purchases are discussed.

Comment:

May I mention concerning your comment that this last year has been exceedingly tough with phone calls and such. I, for a number of years, wore 2 hats as you do by complaining about money being wasted in the school districts. I ended up on the school board for three years, and I found that there is a great minority that is always against something. They are always raising a big voice in school business and in the country generally today. When you go door-to-door, we have not found that there are "agin'ers" expressing the feeling of the people. This has been a great satisfaction to me. In organizing bond issues and such, presenting building programs, although there is great vocal opposition to it, when it came down to the wire, you actually had a count and went door-to-door to give the merits of your program, the public always came through for us. It has changed dramatically in the last four months in favor; the attitude has changed, so I think your pessimistic viewpoint, which is probably very well taken at this point, could change.

Question:

You mentioned the "equal to" clause on any given item in the specifications as related to the interpretation of the writer. Do you use the term "writer" as being synonomous to the owner?

Mr. Brown:

Yes, I mean the owner, because the specifications are put out by the board. We always advertize our contracts. We have some Racine manufactures and always have this problem coming up. When we first hired an architect from out of state, he used the products of a company from Iowa City, Iowa which makes the same product as one of our local manufacturers. In the specs was Trane "or equal", and we got plenty of heat from Modine which makes the same product.

Question:

The reason I was asking is that sometimes contractors come in after my counsel and I interpret this product as equal to the one specified. Who does the interpretation lie with, the owner?

Mr. Brown:

It is the board's decision, and the board has to stand on the decision and show why. They ought to have proof that this is their position and why they back it up. Lots of times when you are building a school, the first thing you generally do is to have an education committee which will specify educational facilities. Then the architect will have his own staff of engineering experts who write the construction specs, and they ought to back up their reasoning.

Question:

The school board then has pretty far ranging powers. They can do just about anything they want. What are the limits of these powers?

Mr. Brown:

Actually, school board powers are limited by the ballot box. I have always taken that position. If people do not like what a school board does, let them vote for somebody else next time. That is the power of the people. The school board is functioning as a creature of the law, a creature of the statutes. You would be surprised actually at the powers which the school board has if they want to use all those powers. Frequently they do not use them because of public acceptance and 'getting along' with the public. The public holds the purse strings, and the public does the voting. The public votes these board members in and out depending on their performances.

Generally the incumbents have the upper hand when running for school board election, because they have already done things.

Actually, the best practice is for school boards to bid on all jobs. Our policy is that we generally bid on all major jobs. We can handle small repair jobs within our own labor force. We do not have to bid this kind of job. Our summer work projects are mainly painting. It depends on the size of the district. For public acceptance it is better to have the policy of bidding although you do not have to by statute.

Question:

If your contract specifies that you have a certain time of payment, you made a comment that you could withhold money. How?

Mr. Brown:

On a percentage basis. That is our hold on the contractor to get him to come back and finish the work he has not done.

Comment:

Yes, we have the power to withhold it if we wish, because we hold the purse strings. Even if the architect certifies it, we can say that we do not believe him. We actually are perhaps violating the contract. Generally a contractor will not complain too much if he knows he has work to do, but the school district can still withhold for a few months until certain work is completed. We have done it before and were able to get certain work out of the contractor who was actually delaying, because he had other work to do. We know that he purposely was passing us up and doing other work. The board is the contract holder, the board has the right to withhold payment as long as the board wishes. The acceptance is only evidence of mitigation. If the matter should come to court, then maybe the board's position might be a little lessened by the fact that the architect gave acceptance and the court might want to know what has happened and the reasons for withholding payment. Then, if the board has good enough reasons, it is their defense in opposition to the mitigation being just a question of fact.

Question:

Does the site purchase have to be tied in to the building referendum bond issue or does the school board have the authority to acquire a site without a referendum?

Response;

Well, the school board has, always has had, authority to acquire sites through its delegated powers. However, the funds with which to purchase the site generally come from a bond issue through referendum. For instance, when we have our referendum election, we put down that we need so and so amounts of money. We specify what monies will be used to purchase sites. We document this. We itemize what sites we are going to buy and from which funds. If we use other funds to buy the sites, we make this known to the public. Actually, it's possible to use interest income monies to buy sites. Bond money is invested to build up an interest fund for site purchase. People generally will not argue against you if you are saving money and using it. It is all public funds.

Question:

But the fact is that the board has authority to designate and purchase the site?

Mr. Brown:

Right, the board has the authority. It is the money involved where the question of the referendum arises.

Question:

If the board has the money, can they go ahead at any time and purchase the site?

Mr. Brown:

Yes, because the money for this purpose is generally put into a school building fund. Money in the school building fund comes from a referendum issue, and that money is invested to gain the interest funds which are plowed back into the school building fund which is available for site purchases.

Question:

Does not this vary with the school district and type of school?

Mr. Brown:

In a common school district the annual meeting has to bring this matter before the electors.

Question:

But in a city school system they may have money available left over from a bond issue or referendum. That site is designated for purchase and some agency has to actually sign for this and actually provide the funds. In this case it would be the city council.

Mr. Brown:

The school board has to go before the city council and ask for power to do this unless they specify it in their budget. When they go before the city council every year and specify certain funds that they need for site purchases if they allow money for that purpose, they can do it. Actually, the city council does not have the power to tell them they can not do it, because if they put it in their budget and the city council passes it, it is in the budget, and the board was given that power. You have to remember that in a city school plan, the city council does not have item control although they think they have.

Theoretically, the city council does not have item control, because the Supreme Court said they do not have it. The Supreme Court delineated and actually made, in words very explicit, the reason for not having item control in the hands of the city council, but I had to pick the book up and read it to the City Council when we had a problem some years ago with a certain alderman who had an ax to grind.

Question:

But they can direct you to reduce your budget X number of thousands of dollars and have control of setting the tax rate.

Mr. Brown:

Right, they have fiscal control and they can lop any amount of money they wish off of your budget.

They can also rather effectively, I think, keep you from buying the site that you may have wanted.

The beauty of a unified school district is the fact that you can get community participation. In other words, you are getting the outlying areas to pay a fair share of education for the inner core areas. By the same token you are allowing the inner core to take advantage of the equalized value of the outlying area. Working hand-in-hand with no city boundaries, actually, you forget about ward lines and boundaries because you are only considering education. You are working as one whole district. Of course, it is hard to sell this idea.

People are still complaining about where schools are built and forget that in a unified district there are no boundary lines except those of the school district.

If the unified school district works properly, you are getting hand-in-hand cooperation of the outer areas and the inner areas. You are also able under this theory to build up a good operating budget, qualify for integrated state aids (a higher level of aids), effectively purchase through central purchasing, and avoid duplication of facilities. Per pupil costs can be kept down in this manner. Actually, Racine always has had a low per pupil cost. I do not know if I am proud of it or not, because I hope it does not affect our quality. We have had a low per pupil cost and we are able to do this because of unification.

Seminar Section 2: LEGAL ASPECTS OF OPERATING FACILITIES

Max Ashwell
Wisconsin Department of Public Instruction
Madison, Wisconsin

Our conversation today is very technical as it concerns the Legal Aspects of Operating Facilities. That breaks down after hearing Mr. Hetzel to How Not to be Negligent in a School District or in Operating a School. There are a lot of don'ts, but I agree very much with Mr. Hetzel on one thing that he said: "Do not worry too much about it."

I am not siding with any insurance companies, but everybody should do what the Supreme Court said should be done in 1962 in the Holytz v. Milwaukee, 17 Wis (2d) 26: they should procure adequate liability insurance. A number of people think that there should be legislation saying exactly what liability insurance they should have. Since the Holytz case, a school district and other municipalities are liable for tort actions like anybody else. We realize that this is the school district's problem.

As with many other problems, school boards should consult with insurance counsel. They should view the risk. In effect, many people would complain if legislation were imposed. In fact, we know that there was an Illinois case in which the legislature put a liability limit on accidents. We have the same statute in Wisconsin with which all of you gentlemen are familiar. The Illinois Supreme Court held that the liability limit was unconstitutional in that this statute limited liability to a certain amount for people who were hit by cars driven by school district drivers.

One case concerned a student who was killed in an accident during a tumbling stunt in the physical education class. This was not driver education. It was claimed that the fatal injuries were a result of the school district's negligence in not having physical education class properly conducted and supervised. The district moved to file counter-claims against the physical education teacher. The main question was whether the school district could do this. The Supreme Court of Illinois held that it could not, because of the statute requiring indemnification of the employee (if the employee was found liable for negligence) eliminated any right of the school district to recover from him. An attack against the state statute requiring school districts to indemnify employees failed. The court rather tersely stated that the statutory limitation of $10, 000 on recovery in each separate cause of action against a public shhool district was unconstitutional.

That gives us in Wisconsin something to think about. The lawyers have thought about it for some time in the cases. This case is Treece vs. Shawnee Community Unit School District. It was reported in 233 NW (2d) 549 (1968).

As you all know before little Jan Holytz was hurt in Milwaukee by a trap door, the simple procedure was for the insurance company attorney (many districts or municipalities have insurance) or for the municipality's attorney to file a demurer to any action filed. This was done in the Holytz case. What was said in effect was, "We admit the school district was negligent," (when you file a demurer you admit the pleading of the complaint), but they also said, "We are not responsible because this law, this case, this stare decisis doctrine, says we cannot be responsible. You cannot sue us, so let us out, Mr. Judge." The judge did that, but the Supreme Court, as Mr. Hetzel said, reversed this judgment.

They said that the doctrine of immunity is no longer applicable in those cases. They also said that they were not deciding that you could sue the state of Wisconsin in their capacity, because that would take authorization by the state. What the Supreme Court said is that this did not apply to the school district, municipalities, minicipal corporations, etc. In other words, for example, they have to have the consent of the state. There is a procedure there. That is not our problem here.

Our problem here is liability and school district facilities. School districts are responsible since Holytz as of course, they are responsible like any other employer, for the acts of their employees, their servants, in carrying out their duties. The employee, for instance, has to be acting in the scope of his employment.

There is a California case, where a teacher was using facilities of a school district. In that case a shop teacher was, on Saturday, using the truck of this school district with the Boy Scouts out gathering scrap material, and there was an accident. They sued the school district. The teacher had no authorization from the school superintendent or from the school people. He said to the kids, "Well, now, use this truck," and they did; and there was an accident. The question was, "Was the use outside the scope of the teacher's authority?" Of course, a teacher could be held personally responsible, but you could not get that school district to pay if they had not authorized this any more than you could have gotten an employer for a similar accident where an employee acted outside of his scope of authority with equipment of the employer. Of course, the employer had notice - in this school district there had been some practice, precedent, and they knew that this was done annually. It would have been a stronger case if they could have proven the board knew about this and the teacher was acting within the acope. Then they could have stuck the school district for this.

Of course, the teacher, like most independents, had no insurance.

It just does not make very good law case to stick a poor teacher and this is what happened after the Holytz case.

People think this is pretty terrible. I mentioned to one of you gentlemen that my brother is an engineer. Some place we were (I think it was in Illinois) looking at a place out on the playground made of real hard concrete. My brother said, "How come you do that," and the school administrator said, "We cannot be sued anyway." My brother almost fell over. This to him was not the way a human being should act. I think that the Holytz case was a very fine case as it made school districts and municipalities act up to their responsibilities. It is in effect similar to the Workman Compensation Act which has made the place of work safer than any other individual piece of legislation in the state of Wisconsin. This removal of immunity of school districts will make the facilities and operations of school districts a most "safe place."

If there are bad accidents and numerous ones on school district property and you have a liability policy, your insurer (if you want to continue with him) is going to come in with a safety engineer, look over your operation, and tell the school district how to work in a safe manner. If you violate these ordinances or "safe place" rules under the Safe Place Statute, it is negligence per se. Perhaps we should go back right here into a few of the legal aspects of operatiog facilities, and then we will know exactly what grounds we talk on.

Under the common law (this is what it was prior to the Holytz case, and still is after the Holytz case except you had a defense which you do not have now), an employer was responsible for the negligence of his employees, his own negligence, or was responsible for the safety of certain frequenters on his premises always owed a degree of duty. For example, a trespasser would walk in properly and then suffer some terrible injury. There was one case where an owner of a premises had some kind of a firearm set where it would go off and blast some trespasser. As a matter of fact, the owner wanted to catch a thief, but if he blasted the trespasser, he was liable to the trespasser to not set traps. This was a very deep-seated rule by common law that you cannot go that far. You do not owe the duty of care to the trespasser that you owe to somebody who is on there to do business with you or at your behest and along came the Safe Place Act.

The legislators decided, through the people, that they would impose a duty of care in a place of employment or public places. This would be a higher duty of care, as Mr. Hetzel said, than that duty imposed by the common law, and that would be an absolute duty. It is in such cases, for example, where there is an Industrial Commission order or regulation promulgated. This regulation has the force of a rule of law. If that is not followed and an accident results or is caused by this (I say that very carefully, because an accident might result that might not have anything to do with that) the owner is liable. I know, because it came up in the Supreme Court when I was a law clerk. I can probably recount it to you.

In 1949, there was a case in Madison. It was concerning an old lady who fell in a dairy. In fact, she was so honest that she lost the case. She knew where she fell. She knew she stepped in a defect in the floor. We measured this defect, and we felt that we could prove it was there. We had blown up drawings which we were going to show to the jury. Under an adverse examination (which counsul always does) she said she was sure that she had known that she had walked in that place and she had fallen. Then she kind of said she was not quite sure. Well, the circuit judge directed the verdict against us in that case and said we might have proven that this was an unsafe place, but he said the lady was not sure where she had fallen there so the unsafe place was no proximate cause of the accident, in other words, in violation of the Safe Place Act. In order to bring yourself within the Safe Place Act you cannot just say negligence per se. You still have to say that the failure to have the stair was the reason for the fall.

There is a recent case concerning falling down stairs placed in violation of an Industrial Commission order. If you want to read the most recent case it is Cossette vs. Lepp 38 WIS (2d) 392 (1968). In that particular case, there was an order requiring steps. You could not get much testimony in this case because the plaintiff was the executor of the state of the decedent. He was suing for the estate. In this case he had made some statements that the deceased had slipped and fallen. The jury could have decided that the fall was from the failure to have the stairs at the proper place. On the evidence they raised the jury questioned of the failure to have the stairs. There was some question whether this dying declaration should get in. The main thing it teaches us is that violation of an Industrial Commission order pursuant to the Safe Place Statute can be the per se or proven cause of the injury suffered. You do not have to prove negligence, however. You do not have to go and measure the thing. You can just say that they did not have it.

All these cases that I am talking about can happen in your school. Anything today could come up in a school, and the school district can be responsible in certain cases. First of all, each school district should have adequate insurance. Mr. Al Buechner, whom all of you know, feels there ought to be a statute regarding insurance. It is something that certainly should be investigated. At least each particular case should be investigated as to what insurance is needed. I do not think you would be catching it as in the higher automobile insurance rates. I do not think you have to pay that much more of a premium. I think it is worth it to a school district. Today, by statute and by case, school districts are authorized to have insurance and, in fact, it is their duty to have insurance today. If they do not have insurance, they could leave the school district responsible for heavy damage and recoveries.

In each case there is still the question of comparative negligence. In each case, the plaintiff can be comparatively negligent. At one time in the state of Illinois, I was with Employers of Wausau, and they had the contributory negligence problem. It all amounted to the same thing to a certain extent except when it got down to the way the insurance companies might have handled it. In the court cases that went to the jury, the jury really looked. They did not want to find contributory negligence, because if they found this poor plaintiff was contributorily negligent, they knew that he would not recover. So they used to just say, "Not contributorily negligent, Amen." Whereas now, where they come under the comparative negligence doctrine, which is fairer, the cost is borne by the negligence of each one of the parties (which is what this whole thing is about - trying to put the cost where the responsibility is) on the theory that, by putting this there, then these people who put it will be far more careful. This is why the comparative negligence rule has come in in all the states.

You still have to find if the defendant school district in each one of these cases can put plaintiffs through their proof and then can prove that the plaintiff was contributorily negligent. School districts allege this and might still get off the hook. We saw from Mr. Hetzel that the bleacher could be part of the Safe Place. Now, there is a lot of distinguishing in those cases about facilities. Look in Corpus Juris Secundum under "Safe Place Statutes," or negligence, and you will find a list of the cases. You could look in Wisconsin Statutes Annotated and find a list of all the Wisconsin cases.

We have "Safe Place" negligence now, because of the statute and the safety regulation. This legislation is simply an example of imposing an absolute duty on the owner or employer to provide a safe place of employment or a safe place for the public. We have heard from Mr. Hetzel about the case in Mt. Horeb concerning a flag pole, where a child was injured and was not within the statute. I feel that today, if this was the case, that this child might probably be covered under common law negligence if not under the Safe Place statute. At that time you could not sue under the common law because the school district would come in and interpose their immunity. Today the plaintiff could probably win so the school district simply has to carry insurance. This is what they told them in the Holytz case in 1962. They told every employer, "We will give you until July, 1962, to buy insurance. After that date, you are going to be just like every other employer." Since then, there has been a statutory limitation of recovery of, I believe, $25,000.

Question:

Has there been an increase in cases since 1962?

__Mr. Ashwell__:

Yes, there have. There are more cases, but most of them are settled before trial.

__Question__:

Have you categorized them? What types of cases have been coming into court? Have they been primarily with classroom facilities, gyms, or on the school grounds?

__Mr. Ashwell__:

In Wisconsin, not an awful lot more have been coming into court, but the majority of them are in the gyms. There has been a bleacher case in Delavan, where they held the city responsible. They held that the city was responsible for the city was the one who put up these bleachers. The same thing would apply to the school district.

__Question__:

Speak to us a minute about the actual liability of the district employee. I think this is the thing we were getting to a minute ago. Would you recommend to these people that they carry liability insurance themselves?

__Mr. Ashwell__:

I feel this way. This is a point to which I started to allude. In a case up north a student had lost part of a finger, and the superintendent called me and said, "Who do I notify?" I replied, "The Industrial Commission," and I gave them the number. I said, "I also would notify your insurance company," and he said, just reflex-like, "We are not negligent." I replied, "When did this happen?" He said, "Just two and a half minutes ago." I said, "You have investigated already and found out you are not negligent. It might take an insurance company a month and then they might decide that they cannot arbitrate it. Report it to your insurance company plus the Industrial Commission. You have got this insurance and you are paying for it. Let the insurance company do the work."

__Mr. Ashwell__:

I wonder how many people here have had accidents in their schools that have resulted in court cases? How were they settled, for example? What kind of .....?

Comment:

I can give you one where the Trudy Schoop troop from New York City came into our community and she stepped off the back end of the stage, went down, and broke a hip. That went all the way in the courts and she finally collected $18,000 or something like that as awarded by the court. You get into trouble as you do not know just exactly what to do in these cases and particularly those in the gym. Those are tough and that is where the teacher is involved. The case of the trampoline - what saved the teacher? He had posted his instructions on the wall right above the trampoline. He had taken it up three or four times in his classes, and there was plenty of evidence to indicate that he had used "due care." What would happen to the Rockford man of some years ago who had a group in the swimming pool and went out and took his morning shave? When he was out shaving, the boy drowned in the pool. He was in no trouble. That was a long time ago; but today, what would happen to physical education men? You had better cover them by insurance.

Your Safe Place statute is one that is technical. For example, are the steps a part of the building? Is the wall back of the building part of the structure?

Mr. Ashwell:

The tendency now is to include more and more in the Safe Place of the grounds.

Comment:

On your grounds, if somebody is trespassing, technically, you are not liable for them in most cases. If you have an attractive nuisance on the ground like our batting cage that the kids climb on because it makes something nice to bounce on, I often thought that something might happen on that. First of all, they are not supposed to be on the grounds then they get on the grounds, then they get on this thing, and it is attractive to them.

Mr. Ashwell:

I think, of course, that the school district during regular school hours has some type of responsibility to supervise that playground as long as children are around it. Let us say in the summertime and off days there might be some liability. Certainly in a swimming pool you would have to provide care to keep children out of that. It has to be locked.

Comment:

Signs can be put up, but they do not really relieve you of responsibility for children.

Mr. Ashwell:

Each one of these cases is a fact situation and is determined on its facts and is usually a jury case.

Question:

When is a person a trespasser on public property such as a school building? When are they considered trespassers?

Mr. Ashwell:

A person is a trespasser if he were there at some time when the school had given notice, for example, on a Saturday or some time when they said the playground was not occupied as during vacation. If the "trespasser" is an unauthorized person, if he is not a student there, if he is just crossing over without any permission, expressed or implied, you cannot recover, but if you can work out any permission of any kind you can recover.

Question:

It is your assumption that anybody can walk into a public school and go anywhere they want at any time?

Response:

My concern on this, say at 4:30 in the afternoon when the doors are still unlocked is that this particular person who we do not want gets in the building. If he does not go to the office and get a permit, he is trespassing, and not everybody has a right to walk into a school building and wander where he wishes.

Mr. Ashwell:

On those facts he was a trespasser, but I still would try to control those. I notice the problems they have in Milwaukee schools over this type of thing, people in the halls, etc.

Comment:

For instance, when salesmen come in with pots and pans for teachers? I had a very interesting experience where a school board member tried to sell teachers investment certificates.

Question:

We were previously talking about advice to get your own insurance. As to personal liability I hear teachers talking all the time that they are pretty well covered by the WEA if they are members. Would you comment on this topic?

Comment:

From what I understand it is $50,000 in all. Something like $10,000 for legal fees rather than the total settlement.

Mr. Ashwell:

You say it is $50,000 liability policy they carry on each member? This is pretty good. There are certainly no judgments against teachers in the state of Wisconsin in that amount. There was a case in chemistry in Delavan. It never went to court. Possibly it was settled. If a child were blinded and a teacher were grossly negligent, possibly the school district did not have adequate coverage. Within the scope of his occupation as a teacher, the school district is going to be responsible under their policy. It is only the cases, as Mr. Hetzel said, under the $200,000 policy where if they get a judgment for $325,000 and the teacher has a $50,000 policy that the plaintiff will probably agree to settlement within that combined amount. I think indirectly it answers your question if the teacher is acting within the scope of his employment and not as in the case of the shop teacher in California who was not within the scope of his employment. Then it is his policy, and it is a severe burden to pay any amount.

If he is about the school's business, the teacher is relatively safe from suit. This is why a teacher should not, for example, drive a bunch of students if this is not within the written policy of the school. He should follow the rules as written down, and then he is covered.

Question:

The reason I bring this up is that this morning I was talking with friends of mine who were mentioning an in-service program they had this year with a member of this organization. The thing that I got out of it as far as teacher liability was concerned was, "don't do anything or you might get sued." This bothers me a great deal, for instance, corporal punishment. It seems to me the people in law say that every case has its own merits. This does not give us any guidelines as to how far we can go to control a child. I for one may not be acquainted with the law, in law terms, and I would like to see it structured a little more to give us guidelines. We have none.

Mr. Ashwell:

I think you can take as a guide what your school board has said and what the law is. Corporal punishment in Wisconsin is permissible as long as only reasonable force is used and you may use reasonable force in enforcing corporal punishment.

Comment:

There is individual merit again.

Mr. Ashwell:

Yes, and then there is rather severe statute against people who are going around using unreasonable force. It makes it almost in the criminal section. It is a very severe thing. A teacher should never use corporal punishment. Maybe there are cases where the teacher has to defend himself, just pure defense to live. He should not use corporal punishment unless another teacher is present to witness that he is using reasonable force. Reasonable force may be quite hard under those circumstances. I was once called by a female attorney who had seen what she claimed the results of unreasonable force implanted on a 13-year old boy. She said, "The mother took down the pants," and I cannot imagine my wife being able to take down the pants of our 13-year old boy to show unreasonable force, because boys just do not like that sort of thing. This woman, however, had seen this; and she thought that because it had left a rather red mark, a welt, for a considerable time, it was unreasonable force. This happened in the morning, and she saw it in the afternoon. She was going to sue. I do not know if she ever did, because I do not think that is the kind of unreasonable force that you would be stuck for. That is more in the traditional kind.

The kind of unreasonable force is where a teacher in Kentucky pulled the ear of a child loose. The court said that was unreasonable force, and on top of that, it was not applied to a place that God had intended to apply that force. These are just a couple of indications of that type of thing. Another case where a teacher, a misguided individual, put an infected hand in scalding water. It was scalded, burned badly, and badly disfigured. It was held that that was a medical treatment attempt. In teaching, you act as a reasonable, prudent person. I do not think that you have to act like what you would think a teacher would act in teaching her own children.

Did not somebody mention a case where a teacher left the swimming pool to take a shave? You would not do that sort of thing. A teacher might reasonably leave children unattended if the teacher had left them before in graduated periods and found out they were responsible. Then you always have to remember another California case where a bunch of high school children were together on a bus, and were left unattended. One of them had a severe injury. The court said that this was negligence as teachers should have been supervising these kids, because they should know that their inhibitions would be released when they all got together and away from supervision. Now this is not facilities or anything like that, but this is the way people act, and this is what that court thought about it. You are not an insurer of a person's safety: the superintendent is not, the school board is not, the teacher is not.

Eighth grade students, you do not see them tied together any more. I talked to one group that had some mentally handicapped children which they took downtown. They said, "This is all right, is it not? We send these kids down town on errands." Mentally handicapped kids! This you should not do. This is not facilities again, but it is common sense. I do not think anybody in the school should do that.

Question:

I happen to be an elementary principal. Is it all right if the teacher brings this child in and sits there, and I give this second grader a whop on the bottom?

Mr. Ashwell:

You stand in the shoes of the parent, so to speak. There is the ancient case in which the parent wanted the child to take one course, and the school said, "No, take another course," a course that was not required. The parent had directed the child. The purpose of corporal punishment in that case was not reasonable. If the child was doing something unreasonable or violating school rules and they decided that his was proper punishment, then it would be proper if there is no school rule saying you cannot do it. If the board enacts a rule saying you cannot use force on a child then you can not do it. In your case, they have not enacted such a rule, I guess, and if you decided on it and it was for a proper purpose ...

Comment:

The rule is a catchall. It says you shall use means to control the children.

Mr. Ashwell:

Is this a school rule to use "means" to control the child? That does not say you shall not use corporal punishment. I think Milwaukee had this rule on corporal punishment. They had the rule that you could not even defend yourself, and then, I think, they enacted the rule that gave the teacher the right to defend himself, to strike back, to restrain. If you took off and got beyond the point of restraining pupils, this would be a question of fact which puts a teacher in a spot. I think today can buy teacher corporal punishment insurance. You probably would not need it, but you can buy that sort of thing.

To go back to your question, you are not an insurer of the child's safety. You are there like any reasonable teacher providing for that person, you stand in the shoes of his parents, and you can do pretty much as his parents would do under similar circumstances as long as the school has not issued any rules contrary to what you are doing.

Comment:

I do not believe in corporal punishment, but I would like to know how far I can go. The very child that would come in here to my office is, in my opinion, the one who needs a spanking and does not get it at home.

Mr. Ashwell:

I suppose you have to do it as a reasonable standard. You are not taking the part of his particular parents. You are doing it as a reasonable parent would act under similar circumstances, not necessarily his parents. His parents say he can smoke too which does not mean he can come to school and smoke. A lot of parents say a child can smoke. That is where the problem arises, but that does not mean they can violate school rules and do it at the school.

Question:

Most districts probably have liability policies to cover their employees. But when might an employee, teacher, or those of us who are administrators become liable personally beyond the school liability? Normally in the performance of our duties, normally when we do something, we are in the performance of our duty. Are there occasions when the district liability insurance might not be applicable to this action? Let us say for some reason it is necessary for me to provide some transportation for youngsters to a particular spot, or to the home, or whatever this might be. Perhaps for some unknown reason I have a kid and I am taking him down to the supermarket as his group is going on a picnic somewhere and I get stuck with providing transportation. Is there danger of courts saying, "This man was not doing what a normal school administrator would be doing; therefore, the district policy would not be applicable?"

Mr. Ashwell:

You just stepped into one of the little danger areas which I have mentioned before, driving. Make sure the school policy includes it. It should be spelled out if you are going to do these things. I think many school policies forbid this.

Comment:

Is not the principal of a building likely to be charged in a legal proceeding, along with the teacher?

Mr. Ashwell:

The plaintiff's counsel will join everybody and then it becomes their responsibility, and this is the reason to have an insurance policy because insurance companies supply counsel.

Question:

Can we legally punish a student by making him work such as picking paper on the school ground, say after school?

Mr. Ashwell:

If a child were injured under those circumstances, you might get yourself involved. You can certainly do what is reasonable discipline. What you just gave me, picking up paper, washing off the blackboards, as I recall, were considered reasonable at that time. There might be a question if the child got injured under certain circumstances and was not supervised at that time.

Comment:

Then I am under the impression that we cannot assign them work. All we could do was to detain them, holding them after school for an hour.

Mr. Ashwell:

To me discipline for a child should be in trying to bring him up on his studies. The administrator has a problem there, a discretionary problem. The court is not going to interfere with him as long as he is reasonable. A lot of these judges would probably feel that picking up paper is reasonable.

Question:

This is a question I have always wondered about. If through our action we cause a youngster to miss transportation home. Let us say that because he is kept after school or through some action in the office, the youngster misses the bus. Are we liable for this youngster, let us say, if he is injured on the way home or if something happened to him?

Mr. Ashwell:

Let us go back to the premise that you are not an insurer of the child's safety under any circumstances. Let us go back to the case where the school district does provide transportation to and from the school which the child attends. The present law requires it. The school district is to do it for parochial schools as a safety measure. I wonder about this because of the safety measure. This having been interpreted for parochial students, at least, as a safety measure, might not the argument be used that it really is a safety measure? By not doing it, you are violating a safety statute and you might be negligent per se if the failure to do that caused the accident. Let us say if this student is just completely knocked out, he is in a physical condition where he should not go home, then he should not be let out in this condition under any circumstance. It depends upon the age of the child, I suppose.

Comment:

Let us say cold weather. He fools around and nips his ears on the way home. So many children show up without a thought of overshoes and frostbite.

Mr. Ashwell:

I suppose that you could argue that the weather is the cause of it and not you. I have said that, since this rule requires that children be hauled to and from the school with the view that it is a safety statute.

Question:

He goes home on the bus, "because," you say, "tomorrow you are going to stay. You must make arrangements for this, and I am telling you at this point that this is what will happen."

Mr. Ashwell:

You called the parents, notified the patents in writing, and they got the notification?

Question:

Must it be in writing? Cannot you just say . . .?

Mr. Ashwell:

It is a matter of proof. These things are all matter of proof. They might all come out in court, and as we know, all conversations are sometimes hard to prove, even hard to get in sometimes because hearsay is objectionable. I know I would object if I were on the other side. It is all a matter of proof.

Question:

Regarding the facilities in playground areas on weekends, we have students that come over with go-carts with their parents, and they use the blacktop area. How responsible is the school district on this? Suppose they bumped into a slide or tree?

Mr. Ashwell:

I do not suppose you could sustain the doctrine of attractive nuisance with the parents. I do not suppose this would apply with them. These children who come to use a go-cart are probably little trespassers running around using your premises. As you said, they know that no one from the school is there at this time. You put them on notice. Again, I would say, there probabby is no responsibility, but you should have signs up as to playground use after school hours.

Comment:

I think if we exercise due care and protect ourselves on the side and have our directions written out and given to parents, the courts would say you are using due care and the court would hesitate to ascribe liability unless it was an out-and-out case of negligence of flagrant lack of "due care".

Seminar Section 3: LEGAL ASPECTS OF LONG TERM FINANCING

Richard Rossmiller
Department of Educational Administration
The University of Wisconsin
Madison

Dr. Richard Rossmiller:

The question at this point is whether we should try and deal with any specific questions, or whether I should start by making a few comments and then maybe going to questions. The legal Aspects of Long Term Financing, are related essentially to two major topics; one is school district debt and the other is construction of school buildings.

School district indebtedness or at least long term debt is almost entirely limited in Wisconsin to capital improvements. You could classify school buses as capital improvements but at least it deals with items whether they are school buildings, sites, buses, or the equipment of the building that have a life that extends for some period of time, are generally not consumed in use, are identifiable, and can be accounted for. This is usually the matter of school buildings, sites and their equipment.

It is important to recognize that a school district has no inherent authority to incur debt, levy taxes, enter into a contract, or anything else. A school district only has the power in those matters which the legislature or the state constitution gives it.

In Wisconsin the constitution provides only that the legislature shall establish and maintain a system of free public schools implying that these should be as equal in quality as possible for children between the ages of 4 and 20, that is they should be tuition free for children between the ages of 4 and 20. It doesn't forbid providing educational facilities for children who are less that 4 and over 20. The constitution does provide for the amount of debt that a school district or other municipality can incur. For an integrated k-12 school district you can incur debt up to 10% of the equalized valuation of the district. For districts that are associated with municipalities (city school districts) there now is a separate limitation for the school district and for the city. At one time there was a limit of 8 per cent for all municipal purposes including schools. Now, I believe it is 5 per cent for all municipal purposes and 10 per cent for school purposes in addition to the 5 per cent municipal limit if a city operates a k-12 integrated district.

Most of the statutory considerations dealing with debt are found in the statutes dealing with municipalities mostly in chapter 60 or more specifically in chapter 66 which deals with the way debt can be incurred, referendum requirements, purposes, and things of this type. This is a chapter which deals with municipalities, but school districts are defined as being included among municipalities so that chapter of the statutes is important for school boards and school administrators.

Another important consideration is that all statutes having to do with debt, taxes, or spending generally are strictly construed which means that the courts will read nothing into them than what is there. They will not assume that anything is granted by a statute. It must be granted specifically. It also means that all the procedural requirements must be followed closely: failure to follow the required procedures in terms of elections, of giving proper notice, establishing proper polling places, having the polls open during the designated periods of time, and things of that nature.

Failure to comply with the statutes may very well invalidate the whole thing and any bonds which are issued as a result of a favorable referendum voice. That, perhaps more than any other reason, is why a school district which is contemplating or is conducting a school bond referendum or any other kind of a levy or debt referendum should secure the advice and counsel of a competent attorney experienced in these matters before, not after, the election to make sure that all of the procedural requirements are met. The bonding houses which will be interested in the issuance of bonds will have their own attorneys to review all of the procedural aspects of the referendum. If they find that there is any shadow about whether these things have been done properly they will not purchase the bonds. They will not risk a million dollars in void bonds. The reason they won't is because it is not possible to recover the money paid for bonds which later prove to be invalid or void unless the money can be identified and recovered without injuring the property of the district.

If the district has already spent part of it, has built a building, or otherwise has invested it in capital equipment, chances are you cannot recover that equipment or that money without injuring the property of the district. For example, if you put in a new boiler, you might get that out again, but if you put in a whole new heating plant, it would be impossible to tear it out without injuring the property of the district, and that is illegal. The bonding houses and investors are very concerned to make sure that all the legal requirements have been met so that their clients or themselves do not end up holding paper which is worth nothing more than it will bring for scrap.

Bonds need not all be issued at the same time. If you have referendum for 15 million dollars of bonds approved, it can be for a five or ten year construction period although ten years is a bit long in terms of being able to forecast precisely what your needs will be. Once the bonds have been approved they can be issued as needed. In some cases, a school district may sell the bonds at a favorable rate of interest and invest the money pending the time it is needed. In Madison, for example, the city has been engaged in the controversy as to whether or not to build an auditorium, who should design it, etc., for the last twenty years. Back in the 1950's a $4 million bond issue for that purpose was approved and was sold at a very favorable interest rate, and the proceeds were invested. The interest has amounted to enough so that they have used the interest for other purposes, the debt is almost paid off, and they are still arguing about whether or not there should be an auditorium, if so, where it should be, and who should design it.

Regarding acceptance of bids for a bond issue and what constitutes a sale, there need not be an actual exchange of money to constitute a sale; that is, the advertisement generally is accepted as the offer. The submission of a bid is regarded as an acceptance, and there need not be unless the statutes required it a formal contract or a formal exchange of money, but the simple acceptance of a bid will consumate a sale. If a person agrees to take or buy bonds and then reneges, the district may sue for breach of contract and the award of damages is usually what it cost the district. If they have to resubmit, readvertise, and take another bid, they can at least secure the cost of advertising, etc. They generally cannot recover the additional interest, if any, that is charged. For example, if the interest rate went from 4½% to 4.75%, it would be a market operation and in general damages are not recoverable for the additional quarter percent of interest, but the actual out-of-pocket cost in readvertising etc. could be recovered.

One other matter which is important for investors is the extent to which you can rely on a statement made on the bond and signed by the president, secretary, director of the board, or whatever the person's title might be that all the things necessary to insure the legality of the bond have been taken care of. If such a statement is made by a person or representative of the body which is authorized to determine that all things have been made, it becomes binding, and a district cannot say later, "We cannot pay these bonds because the notices for the election were not published three weeks in advance. They were only published 2 weeks, and 6 days in advance," or something like this. The only exception to that would be where the bond issue itself is invalid. For example, if it exceeds the debt limit it is completely void and a purchaser cannot recover that excess. They are just out unless they can identify and recover the money they paid. If the money is still in an account and has not been spent, it could be recovered in a legal action. Once it is spent or partly spent it becomes a very difficult process to recover it.

Most bond issues today are serial bonds numbered consequentively from 1 to whatever number is necessary. On serially numbered bonds only those in excess of the debt limit are void. You could sell a million dollars plus 100 thousand and only those that were in excess of the million would be void. If they are not numbered, if they are not serial bonds but simply bonds without any number with no way of identifying which ones were in excess of the debt limit, then all of them would be void.

I think the intricacies involved in school bond referendums, selling bonds, the perspectus that is required, and the timing of the issue to get the best deal are such that most school districts really cannot afford to have a person on the staff who deals with this as his major responsibility. That is the major argument for hiring a consultant, a person, a bonding firm or some other outfit which deals with this daily and knows what the market is like and is aware that at a given time New York City, Dallas, or Los Angeles is going to be floating a bond issue of several million or hundreds of millions of dollars.

In the market for tax-exempt securities you might want to watch what is going on at the federal level, because in recent years many municipalities particularily in the southern states have sold bonds to help attract industry. A village or city will sell bonds at a low rate of interest and then loan money to industries as a way of enticing them to come in, build a plant, and set up an operation. It is now being argued that this is the intent of tax-free municipal bonds, that this is simply a way of providing assistance to private concerns, that it is at least shady if not illegal, and ought not to be allowed.

There is a proposal before congress, I cannot know exactly whether it is in committee or just introduced, which would remove the tax exempt feature of municipal bonds used to subsidize private industry. The tax exempt feature is of questionable value. The value of the tax exempt feature of municipal bonds depends upon when you hit the market and the competition. The tax exempt feature is of interest primarily to wealthy people who want stable, relatively risk-free investments. If your income is a hundred thousand a year the tax exempt feature is worthwhile, because if you are paying income taxes in the 30% or 40% bracket, you can afford to take 20% less income. There are a number of people who are willing to buy. This type of investor is rather limited. Even though it is claimed that a great deal of the wealth of the country is held by elderly widows, nevertheless the number who are in the market to buy tax exempt securities at any one time is quite limited. If you hit the market at a time when other tax exempt bond issues are being floated, chances are you will come out on the short end. You will pay a higher interest rate, because the supply and demand are such that there are more supplies than demand for the low interest, tax free municipals.

Because of all these intricacies, it is very important to have competent advice. There are attorneys and bond houses who employ attorneys to consult with clients regarding the meeting of all requirements to insure that bond issues are valid, that there will be no question raised by any prospective buyer at a later date concerning their validity, and also to make sure that their issues is timed to hit the market when the interest rates are advantageous. Right now no matter what you do you are not going to get very low interest rates in the current money market. It is quite possible that surtax will have an effect within the next two or three months and the cost of borrowing money for municipalities may decline. I do not know whether or not it will be a substantial decline. However, it is likely to go down somewhat.

Let us turn to the construction of school buildings as this is closely related to the long term financing idea, because long term financing is primarily used in school building construction. First of all the authority of the district to construct a building rests on specific grants of power either by the constitution or statutes.

In Wisconsin it is by the statutes. In a common or union high school district, the electors must approve a referendum in an annual meeting or a special meeting. They must also generally approve a site, usually the one recommended by the board but not always so. Sometimes all sites recommended by the board have been turned down by the electors, and you end up with something no one had previously considered. Once the money has been voted and the site has been chosen, the selection of an architect and the decision as to the kind and nature of the building rests with the discretion of the board of education.

Usually, in order to convince the voters to vote yes on the bond issue, you give them some idea of what you plan to do with it, what type of schools you will build, sometimes specifically where they will be built, sometimes whether they will contain a swimming pool or not, but you do not specify how many science labs there will be generally and what kind of materials will be employed except in general terms. These decisions are at the discretion of the board of education. Obviously if they are competent and concerned people, they will get all they can for the money which they have to spend.

A court will not interfere with their judgment, unless as Dr. Hetzel pointed out, they are arbitrary, capricious, or otherwise exhibit judgement that is exceedingly questionable. Fraud, malice or any kind of intent of that nature is sufficient ground for a court to upset their decisions. If all of these considerations are absent, a judge or a court will not substitute its judgment for that of the board concerning what should go into the building and how it should be arranged.

As far as employing architects a contract with an architect calls for personal service just as does a teaching contract.

Therefore, you do not have to get bids from architects. Architects are considered more like artisans and artists than suppliers such as a contractor would be. An architect can be selected in various ways, but you do not have to use competitive bids to select an architect.

The architect is in some respects the agent of the board. He does not have the same authority as an agent of a private employer such as an insurance agent has. He cannot bind the board except as his contract with the board allows. A contract with the board indicating that certain things will be at the discretion of the architect in areas where he is competent to judge would be upheld, but it would not be possible for the board to give the architect carte blanche authority to do anything he wanted to in terms of material, equipment, and arrangement of the building. While essentially this may be what happens, the board must approve his plans, specifications, and change orders.

One of the fundamentals of municipal law is that an elected public body may not delegate its discretion. It may employ people to work for it, but it must be the final judge, the final decider of what must be done. Compensation for the architect is determined by this contract and depending on the project it will be a percentage or sometimes a fixed fee depending on what he is doing, generally a percentage.

On bids on school construction projects, the law in Wisconsin and in most states generally requires competitive bids. I am not sure the exact status of the legislation at the present time, but I think that the last legislative session passed a bill which would require all districts to secure competitive bids on amounts in excess of $2000. At one time only city school districts were required to secure competitive bids. Any school board in its right mind would want to secure competitive bids on a major construction job simply to protect itself from charges of malice, malfeasence, carelessness, or lack of discretion in use of public funds.

Again you have to follow the procedural requirements so that competitive bids are advertised in the proper amount of time, any necessary statements in the advertisement are included, the prospective bidders know where they can get the plans and specifications, and know what the alternates are on which they can bid. They do not need to bid on all alternates. You cannot disqualify a bidder because he chooses not to bid on all alternates. You do not have to award him the contract, but neither can you arbitrarily disqualify him for that reason alone.

Most statutes in most states (Wisconsin is not an exception) require a bid bond to be submitted by a person who is submitting a bid for any public contract. The bid bond generally may either be a bond or could be a certified check in a specified percentage of the total cost of the project. Unless this is submitted as required the person's bid is disqualified. Once the contract has been awarded, all of the unsuccessful bidders are entitled to have their bond or check returned. Once the contract has been signed, the bid bond submitted by the successful bidder may be returned.

The purpose of the bid bond is to insure that the successful bidder will sign the contract and go ahead with it. Otherwise you examine all the bids, you accept one person's bid, and two months later he says, "Well I am sorry but there is a better, more lucrative job coming along in the meantime, and I think I will not go through with this one." If you have 10% of the cost of the project or something like that in hand, he is less likely to make that decision.

A bidder may modify or withdraw his bid up until the time bids are opened. After they are opened, he may not modify or withdraw it unless he has made a material mistake which is evident on the face of the bid. For example, if the bid form includes a number of categories and the dollar amounts for each one totaled, an obvious mistake made in adding those columns would be sufficient reason for withdrawal of the bid without penalty. Generally, if the computations were made on some other sheet of paper and not included with the bid, the person may not then claim that he made a mistake and withdraw his bid. Occasionally this bid revision has been allowed where clearly the bidder is going to be damaged severely if required to go through with the original bid. If a clear mistake has been made as for example where one bidder came in $500,000 below everybody else on a $2,000,000 job, it would not be too hard to understand that somewhere somebody made a mistake. The courts will look at the equity of the matter and look at the obvious facts. Generally, however, a person who submits an erroneous bid may very well end up holding the bag for it.

A question of who is the lowest responsible bidder is one that is of concern. The lowest responsible bidder is not necessarily the one who submits the lowest dollar amount. In determining responsibility you can consider in general terms whether the person is likely to be able to fulfill his contract. This would include the person's experience, financial resources, the extent to which he will have to subcontract the work as compared to doing it under his own direction or with his own crew, his experience in similar projects, etc. If you decide that the lowest bidder is likely to have difficulty handling the job, completing it within the time specified, or generally you are reasonably doubtful about his ability to perform the contract, you may award the contract to the next lowest bidder if he is a responsible contractor.

Usually information of that type which will help establish whether a person is responsible or not, what kind of work has he done, what are his financial resources, and things of this type should be gathered in advance of bid advertising. In New Jersey, the courts have consistently ruled that only 2 things can be considered in deciding whether a person is the lowest responsible bidder: one, financial resources, and two, what did he bid? The person who has the financial resources and who submits the lowest bid automatically gets the job in New Jersey.

Other states have not followed this rule. They have said that it is legitimate to consider all the evidence which bears upon the person's ability to perform a contract according to its terms. If you do not award it to the lowest bidder, you want to have very substantial reasons, but while you have to go through the agony of a court case, generally the court won't interfere with the board's judgements unless there is clear evidence that the board has been arbitrary, capricious, malicious, or simply stupid. Even stupid you can be, but you cannot deliberately award a contract to someone other than the lowest bidder simply because you like them better. That is out.

Question:

In this situation, the prequalification, as you are advertising for bids how do you point out to a particular contractor that he just does not fit?

Dr. Rossmiller:

I think that one of the problems which arises is the relative newcomer in the construction business who may be a good man, but has not yet performed in a job of the magnitude being considered. You want to be careful not to screen that person out. At the same time you try to avoid a situation where he is unable to fulfill the contract.

Question:

Does the board have the perogative to disqualify on past experience?

Dr. Rossmiller:

Yes.

Question:

I mean arbitratily disqualify?

Dr. Rossmiller:

Yes, in New york they do. I do not think we have had a case in Wisconsin. There is a recent case in New York where a board of education told one outfit they did not need to bid because they were not going to get the job. They had a job with New York City previously and failed to perform satisfactorily, and were told they might as well not bid, because they were not going to get the job. The contractor took exception to this and went to court and the court upheld the board of education on the basis of the experience they had had with the contractor.

Question:

Our board of education keeps a running list of all general contractors, and they have this on the basis of previous jobs. For instance many contractors are qualified for jobs up to one hundred thousand dollars. If any new contractor wants to get on this list, he merely has to prove his financial responsibility, and once he is on the list he will be automatically accepted unless he is taken off this list for other than financial reasons.

Dr. Rossmiller:

I think probably the best evidence you can give to justify the refusal to a bidder would be his prior performance for you. That would be par excellence as far as evidence is concerned. This raises the question of what happens if the contractor is not able to complete the job. There is a requirement in most states including Wisconsin that a performance bond be provided to insure that the contractor will fulfill the job according to his contract, and also a bond assuring that those who supply labor and materials for the building will be paid, because a person cannot secure a lien against a public building such as a school.

If the contractor is not able to complete the contract, the school district has two options. One is for the surety company (assuming that there is or is not a combination surety and that a surety company is involved) will take over and finish the job, because a surety stands in the shoes of the contractor if he can not finish, and it is their obligation. If they choose not to do it, then you have to sue the surety company and get a settlement, but that still leaves you with an uncompleted building. You can take over and arrange to have it completed by some other contractor, or the surety can take over and arrange to have it completed one way or the other. Two, if the surety decides that it is financially advantageous for them just to refuse to complete the job and settle financially, then the school board is left with the matter of getting the building completed or if it has not gone too far abandoning the whole thing.

Comment:

Some of these surety companies are not overly eager to wind these things up in the original fashion. They'd just as soon settle to get out with an absolute minimum of problems.

Most of them are not in the building business, they are in the insurance business; a surety bond is simply a contract of insurance. They would prefer not to get into the building business so if possible they would in many cases prefer to just settle, and let you sit and worry about how to get the building completed. You can use any money that is withheld from the contractor. Usually at least 10% of his payments are withheld to insure that he will finish the job properly. Any money that is available in that fashion can be used if necessary to complete the building along with any money that is left in the fund for the building. Where does the element of time fit into this thing, where we have a plumbing contractor on the job who all of a sudden goes bankrupt and does not want to finish the job?

Dr. Rossmiller:

If the prime contractor has subcontracted that is his worry, but if it is one of the prime contractors on the job then really nothing can go forward until you either settle with the surety company or they take over and get someone else on the job. That is where the surety company has you over the barrel, because they can dally around and your building just stands there until something is done. You may decide to just settle and get on with the job, and sometimes the settlement will not be advantageous to you. I guess it is all the more important that even having bonds to try and be sure that the contractor who has the job has every reason to believe that he can come through and perform as he has contracted.

People who supply material and labor for a public construction project can not sue the owner of the building that they worked on to get their money. They are at the mercy of the contractor or of the surety where the surety is guaranteeing the payment of labor and material. It is important in public construction projects to require a performance bond for several reasons: (1) the contractor might have difficulties securing materials and labor if they did not have this kind of insurance, and (2) out of common golden rule of humanitarianism you do not want people to work on a public building and not be paid for their labor or the things they supply.

That sort of covers the topics I have jotted down. I cannot really do justice to the topics in this short period of time.

Before we open up to questions, I would like to call your attention to a book that Prof. Peterson, I, and Marvin Bowles who is a lawyer and law professor at the University of Louisville are in the process of publishing on the law and public school operation. There are two chapters in the book dealing with school property and school building projects, two chapters dealing with school funds generally, and another with debt management. We hope to have it out by February or March next year, and we think it will be the most comprehensive book on school law that is available. The most comprehensive now is Edward's book which was last revised in 1955 and a few things happened in the interim. That will give you a much more comprehensive treatment than we can here.

Question:

If your architectural firm makes a mistake in their planning which has to be corrected by the general contractor what is the situation here as far as the school district is concerned?

Dr. Rossmiller:

The cases I have read or perused indicate that if the contractor incurs additional expense because of an error by the architect or something that does not show on the plans which nevertheless must be done, the contractor is entitled to be paid for that additional amount of work. Whether the architect pays or whether the school district pays is another question.

Comment:

The general rule of thumb, and I think a valid one, is the example of where the chalkboard was left off and you needed the chalkboard. Since you never paid for the chalkboard, you would have no additional cost. You would have had that cost any way if the chalkboard was put in the original plans. The school board expects it and pays for it. If on the other hand the wall or partition on which the chalkboard is mounted is shown in the wrong place when it was supposed to be five feet over and already built and had to be torn down and rebuilt in the proper location and there is no question that is was the architect's error, the school board has a reasonable claim against the architect for an error on his part.

Comment:

Concerning errors and omissions - insurance coverage. I have never seen it used. To what extent do you build into your bond issue something to compensate for errors and omissions?

Dr. Rossmiller:

You should have a contingency fund by all means. The best of us make mistakes. There should be some contingency fund as not only architects make mistakes, but the owner might decide later that someone wants something different. There are probably some changes in any major project.

Question:

I know that the Industrial Commission comes out with certain demands. We always have had to maintain that any change order be signed by myself. On a recent project, we had one signed change order out of 16 and on every one the architect just wrote, "per Industrial Commission." We have had quite a riot on this. Now, I am trying to get the documentation on the request from the Industrial Commission.

Dr. Rossmiller:

I suppose that the more time there is from the time that the plans were developed to the time the job takes place, the more chances there are for the Industrial Commission to change its mind about things. One of the problems with dealing with a state agency (and I do not know how it can be resolved) is that there is no appeal mechanism like there is generally in the law. You can, however, appeal to the courts in the case of the state body. You can only appeal on the basis that it is unreasonable, arbitrary, etc.

Question:

Does the 10% of the equalized valuation exclude interest in figuring the debt limitation? We have $3½ million in debt plus about $1½ million interest on that bonded indebtedness.

Dr. Rossmiller:

You are only talking about the principal itself. The interest is viewed more as a current operating cost except for state aid purposes.

Comment:

What is the period of time practical to use short-term borrowing in lieu of selling bonds? That is the situation we are in right now. Do you just wait, see, hope, and pray? How many years would it be feasible to carry this short-term borrowing?

Dr. Rossmiller:

The Board of Education can borrow on its own motion for up to ten years unless a petition is filed in opposition to it. Then you have to go through an election to decide whether or not you can. I guess it would depend pretty much on what kind of interest you could get on a note as compared to the type of intesest you might get on bonds. The other alternative is callable bonds. If interest rates would become much better, you would call them in and refloat the issue. You have to recognize, too, that you pay some extra price for the callable feature. People want to have more interest on the callable bond than a non-callable one. Particularly if it is a high interest rate period.

Comment:

Where a school board is trying to pass the referendum without any success sometimes there is a case where an architect and contractor or some group offers to design it to their requirements, build it, and rent it to them on a long term lease after which it might be sold to the school district, etc.?

Dr. Rossmiller:

It is almost like the Building Commission idea which is permissible in Wisconsin. It has been used but not recently. Back when the debt limit was 5% of assessed valuation, it did not take long for a school district to run out of borrowing power. Then they could set up a building corporation which consisted usually of the school board or some members of the school board who would agree to build a school. The district would agree to rent it for a 20 year period for the principal and interest payments. The rent could pay principal and interest by the end of the 20 year period. It would then be given in effect to the district. I think this would be similar. In effect the district would be paying rent.

Question:

How does the state financial aids look at that now?

Dr. Rossmiller:

Right now it would be viewed as current operations but this is under review, because there are some people who are not doing quite that. Some of these portable classroom units are being made available on a rental basis. I think that people at Al Kingston's office are beginning to say, "Really, is not this a way of circumventing requirements?" He, of course, has to do this, because if he does not the legislators are very likely to raise the question with him. He has to be able to answer them.

I think there are certain kinds of equipment, for example data processing equipment, which are better rented. When it comes to a fairly straight-forward school building as such, is not this just the way of circumventing the statutory requirements?

Question:

Can a school district in anticipation of a building program which has been approved by the voters delay the building, reinvest the money and using the difference in borrowing and investing interest divert this fund to school operations?

Dr. Rossmiller:

That is a tough question to answer. Generally money that has been provided for a particular purpose can not be used for other purposes. The interest on that money is somewhat debatable. It can be argued that this is not part of that fund and therefore it ought to be available for any legitimate purpose that the school board can spend money. On the other hand, I think you could argue equally strong that if it were not for the fund, the money would not be generated, and therefore it must be viewed as part of that fund and not used for other purposes. I do not know of any cases on this particular topic.

Question:

Taking your viewpoint then would it not be advisable for a school district to pass a bond issue at a period of time anticipatory to the building program and use the difference of interest collected and paid as part of their program for building?

Dr. Rossmiller:

If they can invest the funds for more at a higher rate of interest than they pay, yes. There is one exception to that. The time period is limited, because there have been some cases where it has been ruled that a district cannot accumulate a fund of money to be used at some indefinite future time or for some indefinite future purpose.

Comment:

I am speaking of tying it into a definite program for planning or extension of facilities.

Dr. Rossmiller:

I think within reasonable limitations, for example, Madison has been operating on a 3-5 year program. They will secure or try to secure authorizations and sell several million dollars of bonds. They will not sell all of those bonds at the same time. They will either sell them when the market is advantageous as best they can judge or when they need the money. This is permissible and the proceeds on the interest from the invested portion of the money can be used to supplement the building fund or devoted to other related purposes.

Comment:

In the time of rising costs is not it better to put this earned interest in supplement funds?

Comment:

The state views interest on capital funds as part of the capital fund. There are two sections of the report, one on operating funds, one on capital funds, and they each require a report of interest.

Comment:

I was looking at it from the viewpoint that when we do pay the interest that is not considered as part of your capital debt. It is considered as part of your operating cost from which you take your interest payments. I was trying to look at it from the reverse side of the coin in that if there is for some reason a delay in the construction, why not budget that interest difference into your operating funds? I was wondering about one other comment you made concerning designating sites. Is it always necessary to put the designation to the voters, or can you just ask for permission to build?

Dr. Rossmiller:

In common and union high school districts it has to be approved by the board.

Comment:

The specific site?

Dr. Rossmiller:

Not the specific location of the school house upon the site, but this 80 acres of land or something that is reasonably specific. In unified and city school districts the decision is by the board of education as to where the school should be built. It is also interesting in this regard that sometimes the board of education will indicate whether they will build a certain kind of building on a certain site in the information that is distributed to help secure approval of bond issues. This does not commit them to build that building or at that point. They can change their minds. Again, it relates to the idea that a public body cannot bind its successors except as the law provides.

Seminar Section 4: LEGAL ASPECTS OF CURRENT FINANCING

LeRoy Peterson
Department of Educational Administration
The University of Wisconsin
Madison

Concerning the Legal Aspects of Current Financing I would like to report an item of news that relates to legal aspects of education, concerning what is happening in Michigan in connection with their state support program.

Detroit has been bothered with the state support program over quite a period of time. Their first step was to get some type of adjustment in equalized value which was recognized for state aid purposes. Their point was that they had a heavy municipal load for municipal expenditures, and therefore, the tax base for schools had been eroded. They convinced the legislature that the overload for municipal purposes should be recognized except for the first 5%. They then took the excess tax rate over an accepted level and calculated that in terms of a percentage and applied that percent to an equalized value for each pupil. This had the effect of reducing the equalized value back of each pupil and therefore increased the state support. It increased actually about $18 per pupil which for the number of pupils they have in Detroit, was not enough

A number of taxpayers felt that Detroit was still being discriminated against in connection with their state support program and have instituted a court case. Basically their thinking is that they operate under a foundation program in which a given number of dollars is set for the typical district in Michigan which apparently is a little over $400 per pupil. Then they have a levy on the local tax base. Whatever is provided by that levy is subtracted from the $400, and the state pays the balance.

The point of view of many of the taxpayers in Detroit is that the same number of dollars does not buy the same quality of education in different communities. Whereas the $400 may support most of the educational programs in some of the outlying more rural areas, it supports roughly half of the cost of education in Detroit. Their point of view is that they are therefore being discriminated against in the state support program. It is therefore an illegal operation since the United States Constitution guarantees there should be no discrimination in connection with the various activities. You are discriminated against when you can not bring yourself within the operation of the law so that you can enjoy the advantages. They are saying that districts with equal valuation have a much greater percent of their cost paid by the state in some districts than in others as in Detroit, specifically.

Detroit has started a test case to determine whether the state support program in Michigan is a constitutional operation of the law. If the taxpayers of Detroit are sustained, it means that our whole system of financing education under the foundation program which is in effect in more than half of the states would be ruled illegal.

If you look at the cases that have come up to this point in connection with the state support programs, the courts have sustained state legislatures in their enactments up to the present time. If they accept the policy of state decisions the decision stands and they would simply rule it out. As you have indicated, they sometimes take a new look at what they have been doing over a period of time and say that it may be more important to secure justice in state support than to recognize precedent. In that case you speculate as to what may be the outcome. I am sure this will be taken to the Supreme Court in Michigan and if a U. S. Constitutional issue is attempted as has been done, it will be appealed to the U. S. Supreme Court.

This raises quite a question for us in Wisconsin. Is our state support program in Wisconsin, in fact, discriminatory? The same types of arguments might well apply. There are certain areas in the state in which a given number of dollars provides much more than in others. We have a different pattern to be sure under the equalization incentive plan that we operate, but if all that one would have to do is to probe that the state support program discriminated against an individual district, it certainly could be done in Wisconsin as well as in other states.

We studied at some length the 68 districts which receive over half of their funds from state sources. We looked at their tax rates, and we looked at their educational program. We could match up districts which would have essentially the same educational programs and vastly different tax rates under the Wisconsin program or we could match them the other way. We could match districts that had essentially the same tax rates and very distinctly different educational programs in terms of qualifications of staff and so forth. We could document the fact that by either of these two measures, the support program is discriminatory. Even though this is finance more than law, maybe we ought to take a new look at out state support program to see if we can develop one which can stand the charge of discrimination in connection with state support. Let us speculate. Suppose that in Michigan the Supreme Court of Michigan would say that the Michigan state support program was discriminatory and would not uphold its present operation. Obviously they would then direct that a new state support program be developed which would be non-discriminatory just as they have directed school districts to provide plans for desegregation when they said to desegregate pupils. I would assume that you would move in that direction. We would then need to come up with something which would be as non-discriminatory as it would be possible to make.

If this were the situation in Michigan, then people would immediately question the Wisconsin state support program in terms of the question of whether or not it was discriminatory.

In terms of what the Tarr committee is thinking of, they would throw in the whole business of distribution back to localities for taxes collected from municipalities. This raises a question of whether that is discriminatory particularly in connection with the utility tax in which the users of utilities pay taxes from a very wide area. Yet a place like Cassville, for example, gets more money returned from the utility tax than they know what to do with. There is plenty of basis for raising the question of discrimination in connection with the state support program.

If the Michigan case ends by the high courts saying that this is an acceptable method and the legislature has picked an acceptable and reasonable method of distribution, then this is it. Then there is the question of whether the discrimination will move much further than that.

Question:

Do you anticipate any problems with the City of Milwaukee now that they have an extra appropriation this year, $13 million ultimately for teachers' salaries. Next year, their tax base is not going to support that extra $13 million. Will the distribution of the state aids for the rest of the state be affected by the extra slice that Milwaukee is going to get?

Dr. Peterson:

The distribution of state support will be made on the basis of the present statute unless it is changed. If additional amounts are geared into the state support, additional funds will be required, and I do not think there is any question about providing the additional money. I think the big problem is that this was made as a sort of additional appropriation to Milwaukee to take care of an emergency situation where there was a real threat of teachers' strikes. We have not really thought through the question of whether or not this method is a satisfactory method which would be fair to Milwaukee and to every other school district in the state.

As a related comment I have been doing some consultation with the state of New Jersey where they are drafting a new state support program. They made the mistake of giving the larger cities $26 extra per pupil and then discovered that there was no justifiable method for doing that and that size is not a justifiable basis for providing additional funds. Some of the smaller, older cities have all of the problems of the larger cities, and yet they got not a nickle of additional funds. New Jersey is trying to back out of this as gracefully as they can and work out a state support program which would be fair to all.

I see our problem in Wisconsin somewhat in the same format. The money was given without thinking through very carefully. "Is it fair to Milwaukee and is this fair to all the other school districts in our state support program." We have to think this through and hope that the Tarr committee may come up with some proposals to recognize (and Milwaukee does have a tremendous municipal overload) the problems of Milwaukee but recognize them within the framework of the total state support program which needs to be fair to every district, large and small alike, old and new etc.

It looks like an interesting problem as far as supporting school districts through a state support program and challenges the best efforts of all of us and all people working in public finance. This is one reason I am very happy that the University of Wisconsin set up a center for Educational Finance Studies. We are determined that the first problem we are going to attack is the development of a model state support program for any given state which is just and fair to all districts. Corollary of that is how do you relate it to measuring fiscal capacity? Is there a potential for using income to measure the fiscal capacity of school districts. Secondly, how do you relate this to municipal overload and other municipal expenditures?

Colorado has experimented with something of this type, but unfortunately they used the income of the county as part of the base. That was bad because that within the same county you had very wealthy districts and very poor districts. A poor district caught in an otherwise wealthy county had its state support calculated in a much smaller amount than had this same poor district been in a poor county. The governor of Colorado and the leaders of his party have indicated that in the next session of the legislature they will discontinue this system, but they do want to study the potentials because they too are convinced that any given area having a very high income can pay higher property taxes than if it is a district with the same property valuation and very low income.

We will also have to have an expansion of what we have done in connection with older retired people and their property. We have property relief for people over 65 with low income. In order to do this we have to have information about the property tax paid and the income of these people. With a computer I think it is an easy extra step to have this same type of information on everyone so that it will apply to the individual and not by school districts. Then it will take care of the problem where you have a number of people with very low incomes in a district in which most of the people have very ample incomes.

Maybe we ought to go to a second point which involves a question of teaching contract negotiations within essentially a one year duration. There has not been much concern about that because it is within the authority of a Board of Education. The City Council goes along generally, must go along with salaries arrived at. I am looking at negotiations in terms of the amounts of money involved, of time involved, and I am seeing an extension of the time of negotiation from a one year period to something related to what we have in industry in which they will negotiate for a three year period. In this, I see the legal question of binding the successor. A person may come on the board for a three year period and never actually have anything to say about the amount that is paid for salaries, working conditions, educational programs, as that has all been bargained in advance.

I am wondering about the legal implications of that on the one hand, and what this means in a city school district where we have fiscal dependency of the city board of education on the city council. The city council does not sit in on any of the negotiations as there is no authorization for this in the law. Suppose that this is all worked out on a three year period and you come to your city council with it. Our law provides that the city council shall approve the budget in total and carry the necessary amount in the tax rate or reduce the amount in the budget and then carry that reduced amount in the tax rate. Are we to proceed on the basis that we are really backing into fiscal independence through the back door?

The one case that I read recently involved the question of whether salaries of teachers, when contracts had been negotiated, was an item that could be questioned by city councils even under fiscal dependence. The answer is that a salary negotiated by the board of education and the teacher is a valid contract which may not be satisfied by any outside group. As we look to the future, we have the question of the long-term span, superintendents, and about boards of education, not having any real authority for the period that they are on the board, unless they happen to be at the particular time when a long term contract is entered into. The legal decisions, as you know, are that the board is a corporate body and that when one person is replaced another one comes on, and it makes no difference in the legal life on the board.

The other item that I was going to mention was the question of where do we go in connection with the support of education through the property tax? Many communities are reaching about the limit of property taxes that people will support. In Wisconsin we are more fortunate than in many states because if the board of education thinks that more money is needed, they are authorized to bring in the additional money. We do have the problem of common school districts in approval of the budget, but essentially we do not have to put our budget to a vote of the people for current expenses.

In two states with which I have had recent contact the budget for current expenses must be approved by the eligible voters of the district. In one Oregon case it must be by the majority of the eligible voters, not the majority of the votes cast. Increasingly, it is very difficult to get the people with the pressures of high property taxes to vote sufficient money to operate the schools. If this continues we should look at what is being done in some other cases.

What is developing is sort of a piggy-back arrangement where the local district will put an additional tax on to what the state has already levied, as in the case of a sales tax or income tax. For instance, in some California cities where they are levying a 3% sales tax for the state, the local community will add 2 cents for operation of municipal and school government. Sometimes they make it for school only, and sometimes they make it for the combination. What we are really recognizing here is that you have a trade center which is one district (the people coming from quite a large surrounding district to trade in the area) and they are paying that tax. The people outside of the district are paying the local tax for the support of the educational program to the extent that they buy in that particular school district.

Looking at school support taxes collected from non-school district taxpayers the court said that on the state support program you can levy the money wherever you want and then you distribute it on some satisfactory basis. It was OK. However, when certain communities some years ago were charging nonresident fees at less than cost and the state law provided that no residents could pay more than the cost of the educational program, the courts threw out that type of law. They said you cannot make the poople in one district pay for the education program of children in another district on a local basis, because that is discriminating against the people from the outside. This tuition case was discriminating against the people in the district where the educational program was provided and they had absorbed $20, $30, $40 of the cost of educating children from outside the district. The court said that we could not do that, but we are now doing this in reverse in connection with the piggy-back arrangement.

It has been pretty clearly established that income tax may be taxed where earned or at the domicile of the person so school districts could get at income taxes on either one of those methods. If a person worked in the city of Madison, for example, and lived outside, you could tax the income where earned. Apparently this is permissible because courts have not contested it as the contests have come in relation to the state taxation of income. I think we now have the increasing question of are we moving from the property tax support system without an adequate state support program to provide the money? Are we, in fact, moving in a direction which the courts have previously declared as an unconstitutional operation. I do not know, but I raise this as a question with you.

It looks like we may have to work out a system of satisfactory state support so that the local districts do not have to go to these other types of alternatives.

I will just mention a couple of other things fairly briefly. The payment of fees is a question that recently came up in Wisconsin. I think it is fairly clear now that you cannot charge fees for practically all of the operations we used to charge fees. By ruling of the Attorney General, fees such as for summer school, rental of band instruments, etc. have been outlawed. There are a couple of fees not so outlawed. The major one is the school lunch program where you are authorized to charge a fee. Beyond that we are, in fact, reluctantly making public education free as the constitution in Wisconsin intended.

Since we are talking about the Environment for Learning, the use of school buildings by religious groups has been common practice. For instance, when churches are being constructed or anything happens to churchs, school districts frequently permit the use of the school building by the religious groups and generally do this without charge. I guess you all recognize that you may not legally provide rent-free facilities to sectarian groups. The question is may you secure a rental that will take care of the rental cost?

When you have removed the rental charge you are, in fact, aiding sectarian education or a sectarian society, but then you have to look to some section of the statutes which authorizes the use of school buildings and the rental of school building to private groups.

In Milwaukee I notice that you do have a law in connection with the use of school buildings by private groups. The Milwaukee City System is authorized to rent its schools to religious or other groups. However, you search pretty hard for authority for a typical school district to go into the rental business in connection with school buildings.

A number of states have said that as long as the constitutional guarantee against aiding sectarian religion or sectarian groups is met, they must pay essentially what it would cost to provide the facilities. You may rent the building as long as it does not in any way interfere with school use. In those states, they do not seem to have a much more specific provision for rental of school facilities than we have. Apparently their courts are willing to make a broad interpretation of the implications of statutes concerning the care and direction of school buildings and permit rental. We may be able to proceed in that direction and we may not. Until it is tested I am not sure what the situation would be under our law in Wisconsin which has been pretty strict in holding to the principle that school boards may do only such things as are specifically stated in the statutes or are clear by implication. Would you like to comment on that, Dr. Hetzel?

Answer by Dr. Hetzel:

I think you have covered the field pretty well. When such cases get into court, it depends upon how the justices feel in a given situation under review. That points up one other strategic matter on which the schools and the state are eager to get a conditional precedent established. It is a good idea to choose the right kind of case with which to go to the Supreme Court.

Question:

Dr. Peterson, from what you have said there is some doubt about authority for renting school facitities. Are you speaking specifically about religious groups or are you talking about anybody renting the facilities?

Dr. Peterson:

What I am saying is where in the statutes can we find authority to be in the real estate rental business? Now, if you can find that authorization in the statutes you are all right.

Question:

Is it there?

Dr. Peterson:

It is there by implication. Whether the court will accept the implications that having charge, direction, etc. of property as giving you leeway to rent, one cannot say with any certainty. One can only say that in other states under similar statutes the courts have been willing to say that school districts may rent their facilities as long as it does not interfere with the school activities. They looked with favor in a recent case on the fact that a given amount was charged for the activities so that they did not have any question about granting the use of a public facility for private use. The amount paid was sufficient to defer the expenses of operations. This, apparently, is the determination that you have to make, is there sufficient authority in the implication of statutes to permit you to do this?

Question:

Do you think there is?

Dr. Peterson:

I would say that if it makes good educational sense as an operational procedure, do it, and then let some taxpayers stop you and get a court decision on it.

Comment:

That is quite a strategy.

Dr. Hetzel:

If it is good for the kids, it is good for society and the community should go ahead and do it. Do not hold back and wait until legal authority tells you that you can. You presume that under the law, and as Dr. Peterson said, there is the authority to do it so go ahead. I would say that the general trend of the obligations, and the kinds of services the public schools render over the country, is such that the Supreme Court justices, in their broad interpretation of the law, would say that there is the authority to do this.

Comment:

What about the sale of lots? Supposing you buy a school site consisting of an entire farm of 106 acres, and there is far more land than is needed for the school. Permission has been given by the voters at the meeting to dispose of such land as not needed for school purposes. It is then permissible to sell these lots?

Dr. Peterson:

Actually, the electors could not have stopped the board in most districts from securing land in excess of what is needed. The board of education normally is vested with the authority to make the determination of the amount of land needed and they could well buy this larger amount in anticipation of some type of future expansion. When they get to the point where they realize they are not going to need it, they have no problem disposing of it according to the statutes.

Comment:

What use can be made of balance-on-hand money which may be an accumulation of both left-overs from current expenditures and capital investments.

Dr. Peterson:

I would assume that any investment that you are authorized to make in a sinking fund would be satisfactory for investment of an accumulation of current revenue not needed. You could do pretty well by investing in government bonds. Another thing the board can do is to vote these excess funds at the annual meeting. They could vote these into a suitable sinking fund for specific purposes. I think the board has the right to do that and the statute is fairly specific. It gives you an opportunity to invest at interest.

It will make good advice for all of you who are city superintendents to keep the money, invest it, and bank the interest in the school district operating or building accounts.

Question:

Are there any complications in these communities where the parochial schools are closing down and they then have facilities available for us to rent?

Dr. Peterson:

No, that has been done through implied authority granting you that privilege.

Comment:

If you take part of their building, it is a little problem. They are teaching in half the building, you are teaching in half the building, and you are making a rental contribution with public funds to the development of the parochial school system.

Dr. Peterson:

You are paying rent for a facility and that is as far as the court will go. You are getting your money's worth in that facility and no type of parochial influence comes into that portion of the building where you operate. You may not necessarily have religious influence in a school where you are paying rental because you are not, in fact, investing public funds to support sectarian instruction. You set up your portion as a public school and operate it as such.

Question:

In this case we were renting part of a parochial school. Supposing that parochial school couldn't exist unless they rented a portion of their building. Are not you then aiding this parochial system to exist?

Dr. Peterson:

In the case where this was tried the question that the court asked was, "Was the public school getting value received for the money spent?"

In other words, were you renting this facility for your advantage and not paying in excess for it? Was it completely clear of sectarian influence and sectarian instruction? When it met those two requirements, they held that the public school did have the authority to rent for its own use facilities that were owned by parochial groups, churches, etc.

I would like to mention one additional item because a recent court case has come through in connection with it. Earlier we had information that school activity funds were considered to be public funds subject to control of the board of education and subject to audit the same as any other public fund. In the most recent case class dues were involved in some activity funds and there was considerable protest and questioning as to whether class dues, if intermingled with other funds, were public funds under the control of the board of education and subject to audit. The court decision was that they were.

If school dues are intermingled with the other activity funds, they are subject to audit. If the students do not want their class dues to be part of the public activity fund and if they want to control them on their own, they must keep them as a separate fund not intermingled with other activity funds.

Comment:

As technical points, do they keep them as separate funds through the high school, junior high school, or elementary principal's office? If they are kept in this fashion would they also be subject to audit?

Dr. Peterson:

They are probably subject to public audit. I think you have to keep them in a separate account. You have to set up a class organization with a class treasurer and so forth to operate in this way. Then you would probably have to carry insurance on this because the holder of the funds is responsible for the funds even when they are stolen and when they are lost.

Comment:

You now have minors involved in this thing and would the teacher who is in charge of this thing have to be the involved person who would be insured?

Dr. Peterson:

The custodian and the person who would be insured could be one of your school employees insured for the handling of all funds.

Comment:

Would the checks then written against that account have to be signed by the board?

Dr. Peterson:

No. This procedure would remove them from signing by the board, but if you intermingle your class dues with the money you take in for your football, class plays, etc., it must all go through the board, checks signed by the board, authorized by the board, etc. Students are objecting pretty strenously to having their class dues go into the school fund where they lose control of what the money is spent for. All money in such school district accounts can be spent only for those school things that the school districts are authorized to spend money for, and students are quite unhappy with this arrangement. That is why you get this type of thing as court tests.

Comment:

Each check against the activity fund must be signed by the board?

Dr. Peterson:

If you want to give the students control of the class fund, they must keep those as separate funds. Once they intermingle class funds and class dues with activity funds, they then become public funds to be disbursed by the board of education, signing the checks, determining the expenditures, and these accounts are audited in the same way as any other public account. From a business point of view that makes good sense. The thing I was thinking about was the point of view of the students who protest this type of thing, because they lose control of their money. I do not know; do you have any reaction to that?

Dr. Hetzel:

Yes, I would presume that the board could determine a policy that might satisfy the students. I would also feel that in having a teacher or administrator put in time supervising this student activity fund while he was employed would in itself bring the funds under the public cover to the degree that some courts might consider them as being subject to public control.

About the only way you could wipe your hands of it, as I look at it, would be to do nothing about it. Have the kids set it up themselves and run it the way they want to. If somebody runs off with the money, why, then they had a good education.

Question:

The question is how much liability insurance we should have? Take the case of a very serious bus accident in which the driver was negligent. Can suit be brought against individual board members? Would this be against the district or could it be against the individual board members?

Comment:

I think you have a statute in Wisconsin as there are in most states which directs that you still carry insurance for the school district in these cases.

Dr. Peterson:

His point is, if the amounts of insurance coverage are inadequate, if a train hits a full bus load of 60 pupils, could the excess of award over and above the school district insurance coverage be collected from the board members?

Dr. Hetzel:

If you carry the amount of insurance mandated by statute, I do not think the additional damages suffered could be collected from the schoolboard. There is no possibility of that as I understand the law. I found an interesting thing about insurance as I ran down some of these things. I did not find any palce where it specifically directs or authorizes a school board to carry general liability insurance. Could not this be because about eight or ten years ago this matter of providing various kinds of insurance including liability insurance was legislated so that this was permissible? Up to that time it was considered maybe you could and maybe you could not.

The point I was getting at was that if that authority is not spelled out and the school districts purchase liability insurance, some taxpayers can come in and enjoin you for spending unauthorized monies. Of course, it is better to do that than not carry the insurance and promote the claims. It is the least hazardous of the only two courses that are open to you.

Dr. Peterson:

Particularly since 1962 with school districts liable for torts under the common law, they really have no alternative except to carry insurance. Perhaps we answered your question in a way but you were speculating on what the maximum amount ought to be. Was that the implication of your question?

Question:

If there is a law suit against the district, it brings up the question of whether it is better to carry $5 million liability coverage or to levy enough millage to pick up that $5 million if you are so involved.

Dr. Hetzel:

That depends upon the resources of the school district. Some school districts say they are self-insured. Insurance companies say they are un-insured. If the district is big enough and has enough assessed valuation, then a million dollar claim out of a 40 million dollar budget would be some extra burden, but it wouldn't break them up. A smaller district should carry the larger amount of liability insurance.

Dr. Peterson:

Dr. Hetzel, you have recently abrogated governmental immunity in Iowa. What type of insurance do you have? Do you tend to the maximum?

Dr. Hetzel:

Well yes, although that is in a state of flux. Some schools do not carry it at all as yet. They do not have to carry it, but they are getting organized to do it. They are going to from 1 to 3 million dollar coverages.

Question:

What about book rental?

Dr. Peterson:

Book rental? Yes, I think that is one of the things the Attorney General did predict was not legal,was it not?

Question:

Suppose it was a compulsory course?

Dr. Peterson:

Very specifically, the ruling of the Attorney General was that he did authorize some charge in connection with the use of books.

Comment:

He did not say that book rentals could not be charged. He just said that you could not make anybody pay the rental charges.

Dr. Peterson:

This is the distinction. He said that you could not make anybody pay these fees.

Comment:

If they do not want to pay then you cannot collect them!

Dr. Peterson:

You cannot require the payment of book rental fees.

Comment:

You could charge it, but it cannot be enforced.

Dr. Peterson:

But then do not you immediately move into discrimination if you collect from some and not from the others?

Question:

Is there a requirement relative to the publishing of board minutes as to the amount of time elapsing after the meeting during which the minutes should be approved and published?

Dr. Peterson:

It depends first on the type of community that they are in. You must, however, publish the minutes.

Question

Assuming that we have a paper printed within the district how much time may elapse between the time the board takes the action in its regular meeting and the publication of the minutes?

Dr. Peterson:

I do not recall that there is any specified time, which would mean in a reasonable time following the meeting and before the next meeting. Minutes should be published within 30 days after approval, assuming they have been approved before the next board meeting.

Question:

What happens if the board violates this as to the actions taken? Are they voided?

Dr. Peterson:

We have a requirement that the board minutes be published if there is a paper in general circulation in the community. They must be published within 30 days from the time they are approved. In all probability, the minutes will be approved at the next board meeting which will usually be once a month. That gives

60 days. Suppose the minutes have not been published within 60 days, does this in any way void the action taken? The question was, does this delay in publication of the minutes void any action? The answer is, it does not.